Supreme Court, U.S.
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No.

In the Supreme Court of the United States

BARRY ACKERLEY, WILLIAM ACKERLEY, FULL HOUSE SPORTS & ENTERTAINMENT, INC., AND SEATTLE SUPERSONICS, INC.,
PETITIONERS,

v.

LAURA A. LAMBERT, ESTHER ACKLEY, STEVE BELLING, PAT COOKE, LETITIA SELK, AND CHUCK VILTZ, RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this case, the Ninth Circuit held the petitioner corporations and their chief corporate officers liable for compensatory and punitive damages for violation of Section 15(a)(3) of the Fair Labor Standards Act, which prohibits an employer from retaliating against an employee "because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to" the Act. The questions presented are:

1. Whether the Ninth Circuit correctly held, in conflict with the Second Circuit, that Section 15(a)(3) extends to an employee who complains only to her employer and not to a court or government labor-regulatory agency.

2. Whether the principal officers of large, solvent corporations may be held personally and separately liable for retaliation based solely on their authority to control the operating unit in which the complaining employee worked.

3. Whether the Ninth Circuit violated due process and deprived petitioners of their right to a jury trial by entering judgment for the respondents based on the sufficiency of the evidence supporting a legal theory that was never presented to the jury.

PARTIES TO THE PROCEEDING

All parties are listed in the caption. Petitioner Seattle SuperSonics, Inc. was formerly known as SSI Sports, Inc., and was so named in the complaint.

RULE 29.6 STATEMENT

Petitioners Full House Sports & Entertainment, Inc., and Seattle SuperSonics, Inc. are wholly owned subsidiaries of The Ackerley Group, Inc. The Ackerley Group, Inc. is a publicly traded corporation that was known as Ackerley Communications, Inc. until October 1, 1996.

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Prewitt v. *Factory Motor Parts, Inc.*, 747 F. Supp. 560 (W.D. Mo. 1990) 13

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United States Department of Labor v. *Cole Enterprises, Inc.*, 62 F.3d 775 (6th Cir. 1995) 21

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Miscellaneous:

Hearings on the Fair Labor Standards Amendments of 1977, Senate Comm. on Human Resources, Subcomm. on Labor, 95th Cong., lst Sess. (1977) 3

H. Conf. Rep. No. 2738, 75th Cong., 3d Sess. (1938)..2, 3, 16

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U.S. Dep't of Labor, *Handy Reference Guide to the Fair Labor Standards Act* (Oct. 1996) 15, 24

U.S. EEOC, *Compliance Manual*, Section 8 (1998) 11

PETITION FOR A WRIT OF CERTIORARI

Barry Ackerley, William Ackerley, Full House Sports & Entertainment, Inc., and Seattle SuperSonics, Inc. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the *en banc* court of appeals (App., *infra*, 1a-37a) is reported at 180 F.3d 997. The opinion of the court of appeals panel (App., *infra*, 38a-52a) is reported at 156 F.3d 1018. The opinions of the district court (App., *infra*, 53a-76a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 10, 1999. App., *infra*, 1a. A timely petition for rehearing was denied on July 22, 1999. App., *infra*, 77a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent statutes and constitutional provisions are reproduced in the Appendix. The statutes involved are 29 U.S.C. §§ 203(d), 215(a)(3), and 216(b). The constitutional provisions involved are the Fifth and Seventh Amendments.

STATEMENT

This case presents questions of broad practical importance to the administration of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq*. The Ninth Circuit effectively set aside the language of the relevant statutory provision in favor of policies that the court believed would better serve the goals of the Act. Its reading extends a prohibition on the discharge of an employee who "has filed any complaint or instituted or caused to be instituted any proceeding under or related to" the FLSA to employees who complain only to their employer.

The Ninth Circuit also permitted punitive damages to be imposed not only on the employing corporation but separately and additionally on individual corporate officers, based on their "significant control" over the company's business operations. This ruling sustained $2.8 million of personal punitive liability despite the fact that there was no jury finding (and, indeed, no evidence) that either defendant knew of, approved, or condoned any unlawful retaliatory discharge.

A. Statutory Background

Congress enacted the FLSA in 1938 to serve four goals: (1) to provide workers a subsistence wage; (2) to eliminate exploitative child labor; (3) to minimize, through economic disincentives for overtime work, any deleterious effects of an overworked labor force; and (4) to increase employment by making it more attractive at the margin to hire an additional person than to require existing employees to work overtime. See generally 29 U.S.C. § 202(a); H. Conf. Rep. No. 2738, 75th Cong., 3d Sess. 21 (1938); H.R. Rep. No. 1452, 75th Cong., 1st Sess. 5-7 (reprinting President's message to Congress), 6-8 (1937). The Department of Labor has primary responsibility to administer and enforce the Act.

The FLSA employed two means of ensuring an adequate flow of information to the Labor Department. First, Congress imposed recordkeeping obligations enforceable by injunction and criminal penalties. 29 U.S.C. §§ 211, 215(a)(5), 216(a). Second, it "chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied." *Mitchell* v. *DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960). As this Court explained, effective enforcement of this scheme "could * * * only be expected if employees felt free to approach officials with their grievances." *Ibid.* To prevent obstruction of the administration and enforcement of the FLSA, Section 15(a)(3) of the Act, 29 U.S.C. § 215(a)(3), intruded narrowly upon the traditional at-will employment relationship by forbidding employers to discharge or otherwise

discriminate against any employee who initiated or testified in a proceeding under the FLSA. See H. Conf. Rep. No. 2738, *supra*, at 33. This "prohibition * * * against discharges and other discriminatory practices was designed to serve" the "end" of maintaining employee access to enforcement "officials." *De Mario Jewelry*, 361 U.S. at 292.

Under the FLSA as originally enacted, employees could bring private actions to recover unpaid minimum wages and overtime; but only the Secretary of Labor could sue to preserve the interests in effective administration and enforcement of the FLSA protected by the retaliatory discharge prohibition of Section 15(a)(3). In 1977, however, the Secretary, concerned about limitations on the enforcement capabilities of the Department, proposed expanding the private right of action in Section 16(b) of the FLSA, 29 U.S.C. § 216(b), to include retaliatory discharge cases. "The kind of problem we are concerned about here," the Solicitor of Labor told the Senate, "is where an employee complains to us * * * [,] we bring a suit on his behalf and on behalf of his coworkers, and we win, * * * but a month later that employee loses his job." *Hearings on the Fair Labor Standards Amendments of 1977*, Senate Comm. on Human Resources, Subcomm. on Labor, 95th Cong., 1st Sess. 17 (1977). Congress agreed, and created a private action for retaliatory discharge by adding a sentence to Section 16(b).

B. Factual Background

1. Respondents were employed by petitioner Full House Sports & Entertainment, Inc., as ticket sales account executives ("AEs") for the Seattle SuperSonics basketball team. Petitioner Seattle SuperSonics, Inc. ("Sonics") previously employed some of the respondents, and at trial was treated collectively with Full House ("Corporations"). Petitioner Barry Ackerley was the CEO and Chairman of the Board of Ackerley Communications, Inc. ("ACI"), the publicly traded corporate parent of the Corporations. ACI had six operating subsidiaries and more than 1,000 employees in a variety of businesses throughout the

United States. CR 121, Ex. A:4-8 (Form 10-k).[1] Barry Ackerley also was CEO of the Sonics and Chairman of the Board of the Sonics and Full House. Petitioner William Ackerley was ACI's Chief Operating Officer, and vice-president and a director of both the Sonics and Full House. ER 356-357.

Respondents took telephone orders and made telephone solicitations for Sonics season tickets, multi-game packages, and group sales. App., *infra*, 2a. Beginning in 1991, ticket sales agents were paid a $13,000 base salary, receiving most of their compensation by commission. *Id.* at 2a-3a. Under that arrangement, respondent Lambert earned $91,438 for the 1993-94 year, and other respondents earned over $60,000. ER 277; Ex. A-344.

Respondents' compensation included season tickets to the basketball games, but they also had occasional work assignments at the games. ER 189. Before each game and at intermission, two AEs staffed a season ticket information booth. ER 208-211. In 1991, the Sonics began paying AEs an allowance of up to $2,000 for overtime work at basketball games and other special events. App., *infra*, 3a. At some point, the Sonics began paying routine semi-monthly $166.67 installments during the basketball season, regardless of overtime actually worked. *Ibid.*

In March 1994, John Dresel, Sonics Executive Vice-President, authorized a restructuring of the sales operations to unify the ticket sales operation in which respondents were employed with the ticketing function, emphasize customer service, and rationalize the compensation system across different sales functions. ER 122-125. Concluding that, at $60,000 to $90,000 per year, the ticket sales AEs were overpaid, Senior Vice-President of Sales Laura Kussick decided to

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[1] Record citations follow the abbreviations used in the court of appeals for the Excerpts of Record (ER), Supplemental Excerpts of Record (SER), Clerk's Record (CR), and Reporter's Transcript (RT).

bring the AEs' compensation structure in line with that of other NBA teams, where salespersons performing similar functions earned no more than $40,000. ER 152, 212-213. Kussick and ticket sales director Bob Boustead discussed the new compensation plan with each AE and had follow-up discussions with Lambert and Viltz, whom the ticket sales agents had chosen "to sort of represent the group." ER 287-288. Overtime issues were not raised during these talks. ER 195.

2. Basketball season ticket sales are, of course, highly seasonal. By December of the 1993-94 season, when Sonics tickets were largely sold out, the AEs had little to do beyond clerical follow-up on group sales. The AEs' work week was cut to 20 hours plus game nights. App., *infra*, 3a. Because AEs were working fewer than 40 hours per week, the Sonics discontinued the automatic $166.67 overtime payments. *Ibid.*

Lambert eventually realized that, not having worked overtime throughout the season, she had not received the full $2,000. On May 2, 1994, she left a note with Sonics controller Brian Dixon requesting a meeting about overtime payments. App., *infra*, 3a. She raised the matter with Boustead that day, and again at a ticket sales staff meeting on May 16. ER 166-170.

Two days later, Lambert telephoned the Department of Labor to ask for information. App., *infra*, 3a. Following that conversation, she spoke again with Boustead, who informed her that the overtime payments were a "dead issue." *Ibid.* Lambert then telephoned the Department again and asked for written information about overtime requirements. ER 174-175.

Lambert presented that information to Dixon on May 20. App., *infra*, 3a. Lambert was permitted to testify at trial that Dixon told her that he "knew the Sonics were breaking the laws" but that "his hands were tied [because] Bill Ackerley w[ould] not pay overtime and d[id not] believe" — or "care," depending on the retelling — "what the laws [were]." *Ibid.*; ER

176. Lambert claimed that Dixon warned her that she would be fired if she pursued the overtime issue. App., *infra*, 3a-4a.[2]

On June 17, Lambert's attorneys sent Barry Ackerley a letter detailing her overtime complaints. ER 117-118. In the letter — which began, "We represent Laura Lambert" (ER 117) — the attorneys did not purport to represent anyone other than Lambert, although they did point out that the violations to which they referred affected other employees as well as Lambert. On the same day, Dresel wrote Barry Ackerley's name in his calendar, along with references to "Laura Lambert," "season ticket sales/renewals," and "new building sponsorships." ER 141. About a week later, Dresel notified ACI's general counsel of Lambert's complaints; assuming that Barry Ackerley would be informed of this as well, Dresel wrote "Barry being told" on a notepad. ER 121, 254-255.

Lambert invited the other AEs to join her in a lawsuit, but they all declined. RT [2/8]:165-167. On July 6, 1994, Lambert delivered to the Sonics (but did not file) a draft complaint for unpaid overtime for herself alone, naming Barry Ackerley, William Ackerley, and the Sonics as liable parties. App., *infra*, 4a; RT [2/8]:150-151. On October 6, the Sonics settled this claim in exchange for a full release. App., *infra*, 4a. The Sonics also paid other employees (including respondents Ackley, Cooke and Viltz) amounts calculated to be due them for overtime, and obtained releases from them. *Ibid.*

3. Full House, with Dresel as president, took over the business operations of the Sonics on October 17, 1994. RT [2/16]:753. During the 1994-95 season, the Sonics played in the Tacoma Dome while a new arena was built in Seattle. ER 268A-270. Anticipating another mid-season decline in AE

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[2] Dixon flatly denied having made any such statement; he acknowledged having told Lambert she might be "jeopardizing her future with the organization," but testified that this comment related to the "threatening approach" she was taking. ER 314-317.

work, Dresel had told William Ackerley shortly before the Full House conversion that there likely would be insufficient work to keep the AEs busy and that he planned to lay off the entire staff by November 30. ER 113. The Tacoma Dome group sales staff could handle the Sonics' light workload until the playoffs approached in the spring. See ER 243-244, 297-298.

Dresel discharged the ticket sales staff in early December 1994. App., *infra*, 4a. The discharged AEs were offered severance packages that included a lump sum payment and continued medical coverage for several months, but employees who wished to reserve the right to apply for the new post-restructuring positions were not eligible for severance compensation. ER 114-116. The six respondents each declined the severance package, although none in fact applied for the four restructured, narrower AE positions (or the three group sales jobs) that Full House began to fill in March 1995. ER 205, 223-224; RT [2/8]:212-213. Instead, they brought this action.

C. Proceedings Below

1. Respondents sued petitioners in state court for unpaid overtime compensation and for retaliatory discharge under the FLSA and Washington law. Petitioners removed the case to the Western District of Washington. The district court granted summary judgment to respondents on liability for unpaid overtime, and the parties deferred the determination of the aggregate amount (agreed to be between $5,000 and $15,000). ER 358-359; CR 103.

The retaliatory discharge claims were tried to a jury, which awarded damages of more than $13,000,000: $697,000 for lost earnings; $450,000 for emotional distress (an even $75,000 per respondent); and a whopping $12,000,000 in punitive damages ($5,000,000 against the Corporations, $4,000,000 against Barry Ackerley, and $3,000,000 against William Ackerley). See CR 203. The district court denied motions for judgment as a matter of law on liability and damages, but remitted each of the

punitive damage awards to $1,394,000, for a total of $4,182,000. App., *infra*, at 53a-76a.

2. A unanimous panel of the Ninth Circuit (Brunetti, Rymer, and Kleinfeld, JJ.) reversed in part. App., *infra*, 38a-52a. The panel agreed with the Second Circuit that the language of 29 U.S.C. § 215(a)(3) was "plain and unambiguous." *Id.* at 45a (citing *Lambert* v. *Genesee Hospital*, 10 F.3d 46, 50 (2d Cir. 1993), cert. denied, 511 U.S. 1052) (1994)). That plain language, the panel held, "'limits the cause of action to retaliation for filing formal complaints, instituting a proceeding, or testifying, but does not encompass complaints made to a supervisor.'" *Ibid.* (quoting *Genesee Hospital*, 10 F.3d at 50). The panel explicitly rejected the approach of several courts of appeals that had "extend[ed] the language of § 215(a)(3) beyond its plain meaning so as to effectuate the broad remedial purposes of the FLSA." *Id.* at 48a (internal quotation marks omitted). Because respondents had not engaged in any conduct enumerated in that section, the panel held that they had "failed to state a retaliation claim under the FLSA." *Id.* at 47a.

The panel affirmed the portion of the judgment resting on Washington law because — unlike the FLSA — "Washington law prohibits retaliation against an employee who 'has made any complaint to [her] employer.'" App., *infra*, 48a (quoting Wash. Rev. Code § 49.46.100(2)). Because Washington law does not allow for punitive damages in wrongful termination cases, the panel had no need to address punitive damages. The panel also vacated the identical awards of $75,000 to each respondent in emotional distress damages as excessive and unsupported. *Id.* at 50a-51a.

3. Respondents sought rehearing *en banc*, which was granted. The Equal Employment Opportunity Commission supported the request, observing that "the scope of the anti-retaliation provision is an issue of exceptional importance on which national uniformity is vital." EEOC C.A.. Br. 2. (The

EEOC enforces the Equal Pay Act, 29 U.S.C. § 206(d) *et seq.*, which is an amendment to the FLSA.)

On rehearing — where respondents also attracted *amicus* support from the Secretary of Labor — the Ninth Circuit affirmed the judgment of the district court in an opinion written by Judge Reinhardt. App., *infra*, 1a-27a. Acknowledging that the language of the FLSA was "possibly subject to differing interpretations" (*id.* at 9a), the majority declared that "§ 215(a)(3) protects from retaliation employees who complain to their employer about alleged violations of the Act." *Id.* at 17a. In assigning an expansive scope to the statutory prohibition, the majority relied on "the guiding purpose and design of the FLSA" (*id.* at 2a) and "the animating spirit of the Act" (*id.* at 8a).

Finding that respondents had stated a claim under the FLSA, the *en banc* majority addressed petitioners' other arguments. The court ruled, *inter alia*, that it was permissible to impose separate, additive punishment on Barry Ackerley and William Ackerley because, as Judge Reinhardt put it, the statutory definition of "employer" should receive an "expansive interpretation in order to effectuate the FLSA's broad remedial purposes." *Id.* at 25a (quoting *Bonnette* v. *California Health & Welfare Agency*, 704 F.2d 1465, 1469 (9th Cir. 1983)).

Judge Rymer dissented in part, joined by Judge Fernandez. She observed that "[w]hile the majority's view that 29 U.S.C. § 215(a)(3) protects employees who complain to an employer about overtime may well modernize the FLSA, * * * this is for Congress — not the courts — to do." App., *infra*, 27a-28a. The dissent adopted and reproduced the bulk of the vacated panel opinion.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit has cut the FLSA loose from its moorings in important respects that warrant review by this Court. Although the language of Section 15(a)(3) addresses only the

formal administration and enforcement of the FLSA, the Ninth Circuit — in square conflict with the Second Circuit — held that the provision should be construed to cover complaints made only to employers. As the EEOC has acknowledged, national uniformity on the point is vital.

In addition, the Ninth Circuit held that individual officers of the corporate employer were separately liable for damages based on their routine exercise of executive authority over the employing corporation. The court of appeals did not require a finding or proof that the individual violated the Act — or, indeed, personally authorized, condoned, or even knew of the violation.

Finally, in an egregious violation of established procedures and of petitioners' jury trial rights, the court of appeals rejected petitioners' challenge to a jury instruction that eliminated a crucial element of liability on the ground that the evidence was sufficient to support liability.

This Court's review is warranted to resolve the circuit conflict and to forestall further distortion of the FLSA.

I. THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS OVER THE SCOPE OF THE FLSA ANTI-RETALIATION PROVISION

Section 15(a)(3) of the FLSA prohibits retaliation against three seemingly clearly delineated categories of conduct. An employer may not discharge or discriminate against an employee because that employee (1) "filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter," (2) "testified or is about to testify in any such proceeding," or (3) "served or is about to serve on an industry committee." 29 U.S.C. § 215(a)(3). Only the first category is even arguably applicable here.[3] The Ninth Circuit,

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[3] The "industry committee[s]" that once helped determine wage and hour standards for certain industries now exist only in some overseas territories.

in square conflict with the Second Circuit, extended the first category beyond its plain terms by ruling that the statute covers "employees who complain to their employer about alleged violations of the [FLSA]." App., *infra*, 17a. This Court should resolve the conflict.

A. The Circuits Are Divided On The Scope Of Section 15(a)(3)

The Ninth Circuit acknowledged (App., *infra*, 6a-7a, 11a) that its decision conflicts with the decision of the Second Circuit in *Lambert* v. *Genesee Hospital*, 10 F.3d 46 (2d Cir. 1993), cert. denied, 511 U.S. 1052 (1994). The current EEOC *Compliance Manual* also recognizes the conflict among the Circuits. U.S. EEOC, *Compliance Manual*, Section 8-II (B)(1), at 8–3 n.12 (1998). In *Genesee Hospital*, the Second Circuit held that informal complaints to a supervisor do not qualify as protected conduct under the FLSA's anti-retaliation provision. *Id.* at 55-56.[4] That court began and ended its statutory analysis with the unambiguous language of Section 15(a)(3), which "on its face prohibits retaliation based on 'three expressly enumerated types of conduct.'" *Id.* at 55 (quoting *EEOC* v. *Romeo Community Schools*, 976 F.2d 985, 990 (6th Cir. 1992) (Surheinrich, J., dissenting)). Accordingly, the Second Circuit held, "[t]he plain language of this provision limits the cause of action to retaliation for filing formal complaints, instituting a proceeding, or testifying, but does not encompass complaints made to a supervisor." *Ibid.*

Several federal courts have followed that common sense interpretation. In addition to the unanimous Ninth Circuit panel that originally heard this case and "adopt[ed] the Second Circuit's analysis," see App., *infra*, 45a, three district courts in

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[4] *Genesee Hospital* addressed a complaint under the Equal Pay Act, but that difference is immaterial because that Act "is an amendment to the FLSA and is codified under the same chapter," making Section 15(a)(3) applicable equally to both categories of cases. 10 F.3d at 55.

the Fourth Circuit have recognized that Section 15(a)(3) "could scarcely be clearer * * *. [T]he well-defined universe of protected activities does not encompass * * * informal, unofficial protests." *O'Neill* v. *Allendale Mutual Ins. Co.*, 956 F. Supp. 661, 664 (E.D. Va. 1997); see *Ball* v. *Memphis Bar-B-Q Co.*, 34 F. Supp.2d 342, 346 (E.D. Va. 1999); *Clevinger* v. *Motel Sleepers, Inc.*, 36 F. Supp.2d 322, 324 (W.D. Va. 1999).

A number of other circuits, like the *en banc* Ninth Circuit in this case, have preferred to subordinate the narrow language of Section 15(a)(3) to their view of the "animating spirit" of the FLSA. App., *infra*, 8a; *Valerio* v. *Putnam Associates Inc.*, 173 F.3d 35, 43 (1st Cir. 1999). Those courts have held, notwithstanding the clear language of the FLSA's anti-retaliation provision, that informal complaints to an employer also qualify as protected conduct. See *EEOC* v. *Romeo Community Schools*, 976 F.2d 985 (6th Cir. 1992); *Brennan* v. *Maxey's Yamaha, Inc.*, 513 F.2d 179 (8th Cir. 1975); *Love* v. *Re/Max of America, Inc.*, 738 F.2d 383 (10th Cir. 1984); *EEOC* v. *White & Son Enterprises*, 881 F.2d 1006 (11th Cir. 1989).

The Eighth Circuit, which began the process in *Maxey's*, has forthrightly explained that these "courts, in an effort to further the goals of the FLSA, have extended § 15(a)(3)'s application to employee conduct not expressly covered in the act." *Saffels* v. *Rice*, 40 F.3d 1546, 1548 (8th Cir. 1994); see also *White & Son*, 881 F.2d at 1011 (courts have extended Section 15(a)(3) to protect employees who "did not perform an act that is explicitly listed in the FLSA's anti-retaliation provision").

Indeed, the Third and Eighth Circuits have gone so far as to hold that there need not have been any protected conduct at all, only a (mistaken) belief by the employer that such conduct occurred. See *Brock* v. *Richardson*, 812 F.2d 121 (3d Cir. 1987); *Saffels*, 40 F.3d at 1549-1551; see *id.* at 1551 (Hansen, J., dissenting) (viewing courts as "not authorized * * * to amend the statute by effectively adding * * * words"). Those

courts did not attempt to reconcile their view with Congress's decision ***not*** to prohibit retaliation based on the fact that an "employer ***believes***" an employee had taken any of the enumerated acts. S. 2475, § 22(c), 83 Cong. Rec. 1577 (1937).

The conflict among the circuits is ripe for resolution.

B. The Scope Of Section 15(a)(3) Is An Important And Recurring Question Of Federal Law On Which Uniformity Is Important

There can be no question that the issue presented in this case is recurrent. The cases cited above are only a fraction of the recent cases presenting the issue in the federal courts.[5]

The importance of the issue is equally clear. The EEOC, which administers the Equal Pay Act amendments to the FLSA, advised the Ninth Circuit that "the scope of the anti-retaliation provision is an issue of exceptional importance on which national uniformity is vital." EEOC C.A. Br. 2.

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[5] *E.g.*, *Conner* v. *Schnuck Markets*, 121 F.3d 1390 (10th Cir. 1997); *McKenzie* v. *Renberg's, Inc.*, 94 F.3d 1478 (10th Cir. 1996); *Booze* v. *Shawmut Bank, Connecticut*, __ F. Supp.2d __, 1999 WL 613313 (D. Conn. July 23, 1999); *Johns* v. *Cianbro Corp.*, 1999 WL 200699 (D. Conn. March 29, 1999); *Laird* v. *Chamber of Commerce*, 4 Wage & Hour Cas.2d (BNA) 1629, 1998 WL 240401 (E.D. La. 1998); *Wittenberg* v. *Wheels, Inc.*, 963 F. Supp. 654 (N.D. Ill. 1997); *Bevins* v. *Dollar General Corp.*, 952 F. Supp. 504, 509 n.4 (E.D. Ky. 1997); *Kowalski* v. *Kowalski Heat Treating Co.*, 920 F. Supp. 799 (N.D. Ohio 1996); *Booth* v. *Intertrans Corp.*, 68 Fair Emp. Prac. Cas. (BNA) 433, 1995 WL 324631 (E.D. La. 1995); *Elbaz* v. *Congregation Beth Judea, Inc.*, 812 F. Supp. 802 (N.D. Ill. 1992); *Jones* v. *Westside-Urban Health Center, Inc.*, 760 F. Supp. 1575 (S.D. Ga. 1991); *Cuevas* v. *Monroe Street City Club, Inc.*, 752 F. Supp. 1405 (N.D. Ill. 1990); *Prewitt* v. *Factory Motor Parts, Inc.*, 747 F. Supp. 560 (W.D. Mo. 1990); *Sandt* v. *Holden*, 698 F. Supp. 64 (M.D. Pa. 1988); *Daniel* v. *Winn-Dixie Atlanta, Inc.*, 611 F. Supp. 57 (N.D. Ga. 1985); *Hayes* v. *McIntosh*, 604 F. Supp. 10 (N.D. Ind. 1984); *Fry* v. *Iowa City*, 538 N.W.2d 302 (Iowa App. 1995). See also *Knickerbocker* v. *City of Stockton*, 81 F.3d 907, 910, 912 n.3 (9th Cir. 1996) (noting that district court had reached the issue).

As the EEOC aptly observed (Br. 2-3), differing interpretations of Section 15(a)(3) "give [some] employers an unfair advantage over other employers who are subject to broad prohibitions against retaliation." That is because Section 15(a)(3) effectively determines significant aspects of the employment-at-will doctrine in any given jurisdiction. The Ninth Circuit and the other courts reaching the same result have made it practically impossible to terminate employees who have invoked state or federal overtime laws in complaining to their employers about overtime pay. It is intolerable for federal law to subject employers in California to stringent limitations on the discharge of employees when employers in New York encounter no such federal limitation. In light of this Court's emphasis on appropriate employer compliance policies, *e.g.*, *Faragher* v. *City of Boca Raton*, 118 S. Ct. 2275, 2293 (1998), the split of authority produces an additional and inappropriate burden on multistate employers, who must vary their policies according to the site of each facility.

Moreover, as the Secretary of Labor pointed out to the Ninth Circuit (Secretary of Labor C.A. Br. 2), the importance of Section 15(a)(3) transcends the FLSA:

> Principles at issue here could also affect antiretaliation provisions in other statutes the Secretary administers. See, *e.g.*, 29 U.S.C. 660(c) (Occupational Safety and Health Act); *id.* § 1140 (Employee Retirement Income Security Act); *id.* § 1855(a) (Migrant and Seasonal Agricultural Worker Protection Act); 33 U.S.C. 1367(a) (Clean Water Act); 49 U.S.C. 31105(a) (Surface Transportation Assistance Act).

Because the scope of the FLSA's anti-retaliation provision is an important and recurring question as to which there should be a uniform national rule, further review is warranted.

C. The Ninth Circuit Violated Virtually Every Principle Of Statutory Construction In Allowing Its Misreading Of The "Animating Spirit" Of The FLSA To Override The Ordinary Meaning Of The Statutory Language

Review by this Court is appropriate for the additional reason that the Ninth Circuit exacerbated the error of other circuits in extending the FLSA anti-retaliation provision beyond its plain language. Those decisions fly in the face of this Court's modern jurisprudence of statutory construction. They also fail to consider the statutory context and legislative history of the FLSA.

1. Undefined statutory terms must bear their "ordinary, contemporary, common meaning." *Walters* v. *Metropolitan Educational Enterprises*, 519 U.S. 202, 207 (1997). "[T]he law uses familiar legal expressions in their familiar legal sense." *Bradley* v. *United States*, 410 U.S. 605, 609 (1973) (quoting *Henry* v. *United States*, 251 U.S. 393, 395 (1920) (Holmes, J.)). The "familiar legal sense" of "file any complaint" is to submit a formal claim with a court or enforcement authority. That point is not fairly subject to dispute.[6]

The Ninth Circuit instead relied on its vision of the "animating spirit" (App., *infra*, 8a) of the FLSA in deciding that Section 15(a)(3), despite its terms, was "designed to prevent" employees from being "unprotected by the FLSA against retaliatory discharge when they complain to their employers." App., *infra*, 9a. But this Court has squarely disapproved judicial efforts "[t]o draw on some unexpressed spirit outside the bounds of the normal meaning of the words"

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[6] Indeed, the materials that the Department of Labor provides to the public straightforwardly state that Section 15(a)(3) forbids retaliation against "an employee for ***filing a complaint or for participating in a legal proceeding*** under FLSA." U.S. Dep't of Labor, *Handy Reference Guide to the Fair Labor Standards Act* 13 (Oct. 1996) (emphasis added). There is no hint that griping to employers is protected.

of the FLSA. *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 617 (1944). And, more recently, it has described as flatly "impermissibl[e]" a court's reliance on "its understanding of the broad purposes" of a statute to expand the meaning of statutory terms whose meanings are already "sufficiently clear in * * * context." *Rodriguez* v. *United States*, 480 U.S. 522, 525, 526 (1987) (internal quotation marks omitted).

In a legal or administrative context — which is the context of the FLSA — the terms "file any complaint" and "institute any proceeding" have clear and precise meanings that connote formal involvement of the courts or the regulatory agency whose investigative and prosecutorial efforts Section 15(a)(3) was enacted to protect. This Court made clear that Section 15(a)(3) was intended to protect employees in their "[r]esort to ***statutory remedies***." *DeMario Jewelry*, 361 U.S. at 293 (emphasis added). The limited intrusion on the at-will employment relationship described by the language of Section 15(a)(3) reflects Congress's focused purpose: to prohibit conduct that might "obstruct [the] administration" of the FLSA. H.R. Conf. Rep. No. 2738, *supra*, at 33. As this Court has recognized, Section 15(a)(3) was "designed to serve" the goal of "effective ***enforcement***" by freeing employees "to approach ***officials*** with their grievances." *DeMario Jewelry*, 361 U.S. at 292 (emphasis added). Indeed, even the Ninth Circuit had to admit that "Congress intended the anti-retaliation provision of the FLSA to provide an incentive for employees to ***report*** wage and hour violations ***by*** their employers," App., *infra*, 7a (emphasis added), not to complain about them ***to*** their employers.

That limitation accords with the statutory scheme of the FLSA. Rather than encouraging private, informal resolution of overtime disputes, the FLSA "is designed to ***prevent*** consenting adults from transacting about minimum wages and overtime pay." *Walton* v. *United Consumer Club, Inc.*, 786 F.2d 303, 306 (7th Cir. 1986) (Easterbrook, J.) (emphasis added). The FLSA places so much emphasis on government involvement that employees cannot validly settle minimum-wage or over-

time disputes with their employers without the approval of either the Department of Labor or a court. See *Lynn's Food Stores, Inc.* v. *United States*, 679 F.2d 1350, 1353 (11th Cir. 1982); 1 M. ROTHSTEIN, *et al.*, EMPLOYMENT LAW 373 (1994); see also *D.A. Schulte, Inc.* v. *Gangi*, 328 U.S. 108, 116 (1946) (invalidating private settlements); see generally *Barrentine* v. *Arkansas-Best Freight System*, 450 U.S. 728, 740-745 (1981). "The idea" of the FLSA "is that federal supervision replaces private bargaining." *Walton*, 786 F.2d at 306. In that context, interpreting Section 15(a)(3) according to its terms to channel employees into formal enforcement procedures makes perfect sense — far more so than the Ninth Circuit's construction, which embraces informal complaints to an employer about overtime that "need not refer to the statute by name." App., *infra*, 17a.

2. Although statutory construction properly "begins with 'the language of the statute,'" *Hughes Aircraft Co.* v *Jacobson*, 119 S. Ct. 755, 760 (1999), the Ninth Circuit instead began with its preferred result and worked backwards. The court did conclude, almost as an afterthought, that the language of the statute was "fully consistent" with its interpretation. App., *infra*, 9a. But it could do so only by employing a strained and artificial method of linguistic analysis that has been specifically disapproved by this Court.

The Ninth Circuit first dismembered the common phrase "file any complaint" into its constituent parts "file," "any," and "complaint" — ignoring the well-established meaning of those words when they are used together. See App., *infra*, 9a-10a. It then selected a tertiary definition of the word "file" and the non-legal definition of "complaint." *Ibid.* The court also inferred unlimited breadth from the word "any," *ibid.*, deciding that "any complaint" must include complaints made to employers — not merely unmeritorious as well as meritorious complaints "under or relating to [the FLSA]" that were actually "filed," as the statutory context suggests. And it interpreted the term "under or related to [the FLSA]" to encompass private

complaints on the ground that "or related to" otherwise would be "superfluous." *Id.* at 10a. That effort reads too much into boilerplate that applies both to "complaint[s]" and "proceeding[s]." Moreover, private lawsuits, particularly in state court, might be filed under state law but still "relate to" FLSA violations. Indeed, an employee who files a formal minimum wage or overtime complaint with the labor department of a State clearly does not file a complaint ***under*** the federal FLSA, but just as clearly files a complaint that is ***related to*** that Act. See, *e.g.*, *Sapperstein* v. *Hager*, __ F.3d __, 1999 WL 623907 (7th Cir. Aug. 17, 1999).

The Ninth Circuit's dissecting approach contravenes well-established principles of statutory construction. There is no room for judicial alteration of "a phrase that * * * has a clearly accepted meaning in both legislative and judicial practice." *West Virginia University Hospitals* v. *Casey*, 499 U.S. 83, 98 (1991). In the context of a statute setting forth legal obligations or remedies, the phrase "filed any complaint" has a "clearly accepted meaning" — *i.e.*, filed a formal complaint, regardless of merit, with a court or administrative agency — that cannot be obscured by artificially parsing each word. See *Textron Lycoming Division, Avco Corp.* v. *UAW*, 118 S. Ct. 1626, 1629 (1998) ("It is not the meaning of 'for' we are seeking here, but the meaning of '[s]uits for violation of contracts.'").

The proper interpretation of Section 15(a)(3) becomes even clearer when the language of that provision is contrasted with the language used in the anti-retaliation provisions in other federal statutes. When Congress wanted to draft an expansive anti-retaliation provision, it knew how to do so. In Title VII and in the Age Discrimination in Employment Act, for example, Congress forbade employers from retaliating against any employee who "has opposed any practice" those laws make illegal. 42 U.S.C. § 2000e-3(a); 29 U.S.C. § 623(d); see also 29 U.S.C. § 2615(a)(2) (Family and Medical Leave Act) ("for opposing any practice"). That language — not the very different FLSA language at issue here — aims at protecting all

"employees [in] asserting their rights" to their employers. App., *infra*, 9a. Other anti-retaliation provisions trace the language of Section 15(a)(3) but additionally protect employees who "participate in any manner * * * in any other action to carry out the purposes" of a statute. *E.g.*, 42 U.S.C. §§ 300j-9(i)(1)(c) (drinking water pollution), 5851(a)(1)(F) (nuclear facilities), 7622(a)(3) (air pollution). Congress has not seen fit to add similar language to the FLSA.

3. To the contrary, in enacting the FLSA Congress in fact ***rejected*** a proposal that would have removed the requirement of actual, formal invocation of enforcement procedures. The Senate version of the FLSA would have prohibited discharges "because such employer ***believes*** that such employee has done or ***may do*** any of" the acts specified in Section 15(a)(3). S. 2475, § 22(c), 83 Cong. Rec. 1577 (1937) (emphasis added). This language would plainly have reached the conduct of respondent Lambert in this case. But the language of the Senate bill was rejected in conference, and it was the House version, which required the actual filing of a complaint, that was enacted into law. Neither the Ninth Circuit nor any other court reaching the same result has even acknowledged, let alone addressed, this legislative history.

The narrow scope of Section 15(a)(3) is confirmed by the understanding expressed in subsequent legislation, an understanding that is "entitled to great weight." *Loving* v. *United States*, 517 U.S. 748, 770 (1996). In 1985, after this Court upheld application of the FLSA to state and local government employees, Congress perceived a special need to protect such employees during the initial period of adjustment to FLSA requirements. It accordingly enacted a temporary statute broadening the retaliation prohibition to protect public employees who merely "asserted [FLSA] coverage" to their employers. Pub. L. No. 99-150, § 8, 99 Stat. 791 (1985). If the Ninth Circuit were correct that Section 15(a)(3) already covers employees who complain to their employers about "an alleged

FLSA violation" (App., *infra*, 17a), the 1985 enactment would have been superfluous.

Section 8 of the 1985 law further specified that, once it expired in August 1986, protection against retaliation would extend "only" to "an employee who ***takes an action described in***" Section 15(a)(3) (emphasis added). That provision too would have been entirely unnecessary if informal complaints to employers were already covered by Section 15(a)(3). The Ninth Circuit's response, distinguishing assertions of coverage from complaints of violations (App., *infra*, 12a n.4), makes no sense: an assertion of FLSA coverage, made to an employer being faulted for not complying with the FLSA requirement, is *ipso facto* an informal complaint that the employer is not complying with the FLSA.

This Court has warned that, in interpreting the FLSA, courts "must avoid that retrospective expansion of meaning which properly deserves the stigma of judicial legislation." *Addison*, 322 U.S. at 618 (internal quotation marks omitted). What the Ninth Circuit and other, like-minded courts have done is "not a construction of [the] statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope." *West Virginia Hospitals*, 499 U.S. at 101 (quoting *Iselin* v. *United States*, 270 U.S. 245, 250-251 (1926) (Brandeis, J.)). Such an effort "[t]o supply omissions * * * transcends the judicial function." *Ibid.*

II. THE NINTH CIRCUIT COMPOUNDED ITS ERROR BY CONSTRUING THE FLSA TO RENDER CORPORATE OFFICERS PERSONALLY LIABLE FOR THEIR SUBORDINATES' RETALIATION

The Ninth Circuit distorted the FLSA in another respect. It not only upheld nearly $1.4 million in punitive damages against the corporation that was respondents' employer under any conventional analysis, but it sustained an additional $2.8 million in punitive damages imposed on two corporate officers

personally, without requiring a jury finding — or, indeed, any evidence — that the individuals undertook, authorized, or condoned an action prohibited by Section 15(a)(3). Instead, the officers' personal liability was based solely on their supposed status as "employers" of the respondents, defined with exceptional breadth as any "individual [who] exercises 'control over the nature and structure of the employment relationship,' or 'economic control over the relationship'" (App., *infra*, 25a).

The Ninth Circuit's analysis would render the CEO or other top-level executives of any large, publicly traded corporation separately and individually liable for virtually any violation of the FLSA committed by a subordinate with respect to a function that falls within the executives' ultimate area of responsibility, even though the executive did not participate in or even know of the violation. The sweeping implications of this ruling make it one that warrants further review.

A. The court of appeals relied (App., *infra*, 25a) on Section 3(d) of the FLSA, 29 U.S.C. § 203(d), which includes in the definition of "employer" "any person acting directly or indirectly in the interest of an employer in relation to an employee." Broad as that language is, it is doubtful that it was intended to make an officer of a large corporation the ***personal*** and ***separate*** employer of those employees whose activities the officer is empowered to direct or supervise.[7]

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[7] As the First Circuit has observed, "[i]t is difficult to accept, * * * as some courts have apparently held, that Congress intended that any corporate officer or other employee with ultimate operational control over payroll matters be personally liable." *Donovan* v. *Agnew*, 712 F.2d 1509, 1513 (1st Cir. 1983). See also *Baystate Alternative Staffing, Inc.* v. *Herman*, 163 F.3d 668, 679 (1st Cir. 1998). Cases sustaining personal liability for back wages or damages — none of which involved punitive damages — have generally concerned individuals who dominated the affairs of a partnership or closely held corporation. *E.g.*, *Herman* v. *RSR Security Services Ltd.*, 172 F.3d 132 (1st Cir. 1999); *United States Department of Labor* v. *Cole Enterprises, Inc.*, 62 F.3d 775 (6th Cir. 1995); *Dole* v. *Elliott Travel & Tours, Inc.*, 942 F.2d 962 (6th Cir. 1991); *Donovan* v. *Grim Hotel Co.*, 747 F.2d 966 (5th Cir.

Whether or not corporate officers may be the employers of corporate employees for some purposes under the FLSA, Section 16(b) of the Act, 29 U.S.C. § 216(b), imposes liability for damages only on "[a]ny employer who violates the provisions" of Section 15(a)(3) by discharging or otherwise retaliating against an employee because the employee engaged in protected activity. In this case, neither the district court nor the Ninth Circuit required any jury finding that the individual defendants in this case had personally "discharge[d]" any of the plaintiffs, or authorized or approved their discharge, as a retaliation for activity protected by the FLSA.

Instead, in instructions approved by the court of appeals, the jury was charged that any "corporate officer or director with significant control of * * * a corporation" that employed respondents was "liable if you find in favor of the plaintiffs on their FLSA claims." ER 361-362.[8] Thus, petitioners Barry and William Ackerley could be found individually liable so long as (1) respondents had been discharged in violation of the FLSA and (2) the officers had "significant authority" over the company that employed respondents. ER 361-362; SER 25. Given the individual petitioners' positions in the companies, the instruction effectively directed verdicts against them if the corporation was found liable.

The Ninth Circuit's recitation of the meager evidence supporting punitive liability (App., *infra*, 26a) shows how little it requires to find a corporate official personally liable for retaliation. The court relied on (1) evidence that the Sonics had

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1984).

[8] Contrary to the Ninth Circuit's retelling (App., *infra*, 25a), the various factors included in the instruction were explicitly identified as "[e]xamples" (ER 361, SER 25), most emphatically not as prerequisites to a finding of "employer" status. All the jury had to find was that the individuals had "significant control," which sufficed under the instructions to render them, like the corporate employer, vicariously liable for the actions of John Dresel.

not paid overtime until 1990 — four years before the events at issue here — when a new manager implemented an overtime system (see SER 279-280); (2) a prior FLSA lawsuit ***resolved in the Sonics' favor*** as time-barred (ER 86; RT [2/26]:183-184); (3) evidence that Barry Ackerley was made aware of Lambert's overtime concerns five months before the discharges (ER 121); and (4) the double hearsay statement that allegedly, six months before the discharges, attributed to William Ackerley an unwillingness to pay overtime (see p. 5, *supra*).[9]

In the Ninth Circuit's view, the items it identified represented "extensive testimony that both Ackerleys * * * were involved in the decision to terminate the sales staff." App., *infra*, 26a. But whatever these circumstances establish, they plainly do not show personal involvement in a decision to discharge the AEs ***in retaliation for an act protected by Section 15(a)(3)***. There was not a shred of evidence that Barry Ackerley even knew of the plans to discharge the AEs, or that William Ackerley had the slightest idea that Dresel's action was being taken to retaliate for Lambert's overtime complaint (see pp. 6-7, *supra*; see also ER 113), which to all appearances had been fully resolved some weeks earlier. Even the Ninth Circuit shied away from explicitly resting liability on William Ackerley's receipt of Dresel's memo stating plans to "layoff the entire ticketing staff" because the "seasonal" workload left them with "insufficient work to keep [them] busy." ER 113.

Thus, in the Ninth Circuit, being informed of a termination decision beforehand (in the case of William Ackerley), or even afterward (in the case of Barry Ackerley), is sufficient to hold an individual liable for retaliation — and for separate,

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[9] The Ninth Circuit did not identify any evidence supposedly providing "strong[] support[]" for "the jury's determination that both Ackerleys actually exercised economic and operational control over the employment relationship with the sales agents." App., *infra*, 25a-26a. No wonder: William Ackerley had not even ***met*** most of the AEs (ER 329-330, 338-340), and Barry Ackerley had still less involvement with them.

individual punitive damages exacted in addition to those imposed on the corporate employer — without any evidence that the individual ordered the termination of any employee, much less did so "because such employee" had engaged in activity that is protected under Section 15(a)(3). Incredibly, the Ninth Circuit relied on these factors to exact millions of real dollars from real people.

The imposition of vicarious liability on individual corporate officers is especially problematic in the context of an award of separate and additional punitive damages. To date, other courts have concluded only that an individual "deemed an employer under the FLSA * * * may be jointly and severally liable for damages." *Lee* v. *Coahoma County*, 937 F.2d 220, 226 (5th Cir. 1991); see, *e.g.*, *Fegley* v. *Higgins*, 19 F.3d 1126, 1131 (6th Cir. 1994) (individual held "jointly liable for all damages"); *Dole* v. *Elliott Travel & Tours, Inc.*, 942 F.2d 962, 965 (6th Cir. 1991); *Patel* v. *Wargo*, 804 F.2d 632, 637-638 (11th Cir. 1986); *Donovan* v. *Agnew*, 712 F.2d 1509, 1511 (1st Cir. 1983). The Ninth Circuit's significant expansion of the liability of individual co-employees of FLSA plaintiffs appears to be unprecedented.[10]

The problems created by the Ninth Circuit's decision are particularly troubling because the issue will most often arise in a private cause of action, such as that here. In such circumstances, one simply cannot rely upon the exercise of sound

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[10] The unfairness of imposing personal punitive liability in this case is especially pronounced when (1) no prior decision had given notice that individual corporate officers may be held vicariously liable for punitive damages under the FLSA, and (2) the language of Section 15(a)(3) gave no express indication that its protections are activated by informal "complaints" that are "filed" with the employer; the Labor Department's *Handy Reference Guide* likewise suggested that only formal legal or administrative complaints are protected (see p. 15 n.6, *supra*), and the courts themselves could not agree on the scope of the provision. Under such circumstances, constitutionally required notice of potential punitive consequences has not been afforded. See *BMW* v. *Gore*, 517 U.S. 559, 574 (1996).

prosecutorial discretion to curb abusive or vindictive suits against individual corporate officers.[11] Further review is warranted to remedy promptly the gross distortion of the FLSA that this decision approves.

III. THE NINTH CIRCUIT VIOLATED PETITIONERS' JURY TRIAL RIGHT BY AFFIRMING A FINDING ON A DISPUTED, ESSENTIAL ELEMENT OF LIABILITY ON A BASIS NOT FOUND BY THE JURY

Section 15(a)(3) imposes liability only for retaliation against "any employee because ***such employee*** has filed any complaint or instituted or caused to be instituted any proceeding under or related to" the FLSA (emphasis added). The analogous provision of Washington law similarly applies only to "such employee" as takes enumerated action. Wash. Rev. Code § 49.46.100(2).

The only one of the six respondents who actually communicated with the company regarding the subject of overtime was Lambert. Petitioners accordingly resisted the claims of respondents Ackley, Belling, Cooke, Selk, and Viltz on the ground that none of them had taken an action to which the anti-retaliation provision applies (even under the expansive reading given it by the courts below). Over petitioners' objection, however, the jury instructions read the words "such employee" out of the statute:

> It is ***not*** necessary to show that each plaintiff engaged in protected activity. A showing that one plaintiff engaged in protected activity is sufficient so long as there is a showing

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[11] For example, in *Digiore* v. *State of Illinois*, 962 F. Supp. 1064, 1078-1079 (N. D. Ill. 1997), the court, having expansively defined "employer" under Section 3(d) and having found the State of Illinois immune from FLSA liability, permitted the lawsuit to proceed against the Illinois Secretary of State and Director of the Department of Police, aimed solely at those officers' personal assets. See 172 F.3d 454 (7th Cir. 1999) (affirming later grant of summary judgment for individuals on other grounds).

> that adverse employment action was taken against each plaintiff and that the protected activity was a substantial motivating factor in the adverse employment action as to that plaintiff.

ER 360 (emphasis added). This instruction effectively directed a verdict on this element for all plaintiffs so long as the jury found that "one plaintiff engaged in protected activity." *Ibid.*

The Ninth Circuit affirmed the judgment in favor of all six plaintiffs. It did so not because the instruction was correct, but because there was sufficient evidence to support a finding that "Lambert complained on behalf of the named plaintiffs and that sufficient evidence was therefore presented to support a retaliation claim with respect to all the plaintiffs." App, *infra*, at 22a.[12] The court was not deterred by the fact that ***the jury had not been asked to make any such finding***. Rather, in its haste to affirm the judgment, the Ninth Circuit arrogated to itself the role of factfinder.

That the court of appeals' disposition of this issue violated petitioners' constitutional rights to due process and to a jury trial can hardly be subject to fair dispute. The Seventh Amendment provides that "the right of trial by jury shall be

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[12] In fact, this conclusion rested on the slimmest of foundations. The June meetings in which Lambert and Viltz had been chosen "to sort of represent the group" (ER 287-288; see SER 265) concerned the restructuring of AE compensation, not overtime (ER 195, 212-213, SER 201-204). The very first sentence in the letter from Lambert's attorney to Barry Ackerley — on which the Ninth Circuit relied heavily (App., *infra*, 22a) — declared: "We represent Laura Lambert" and not anyone else. ER 117. Likewise the complaint delivered to the Sonics (but never filed) was solely on behalf of Lambert (RT [2/8]:150-151). Indeed, when Lambert asked the other AEs to join with her in the contemplated lawsuit, every one of them refused. RT [2/8]:165-167. The scantiness of the evidence is apparent from the Ninth Circuit's need to include a snippet from Dresel's trial testimony commenting that "the whole group [wa]s now lumped together" in a press release issued ***after the lawsuit was filed*** (see ER 264), as well as a reference to Lambert as a "ringleader" in petitioners' opening statement. See App., *infra*, 22a-23a.

preserved." Under this Amendment, together with the Fifth Amendment's Due Process Clause, findings of liability require jury determinations of every reasonably disputed element of the cause of action. Appellate courts cannot take that function upon themselves.

As this Court has explained, "the Seventh Amendment provides a right to a jury trial on ***all*** issues pertinent to" liability. *Feltner* v. *Columbia Pictures Television, Inc.*, 118 S. Ct. 1279, 1281 (1998) (emphasis added). Accord *Beacon Theaters, Inc.* v. *Westover*, 359 U.S. 500, 508 (1959) (ensuring that mixed issues of law and fact be tried first to the jury, to "giv[e] * * * a full jury trial of every * * * issue."). The Court had to remind the lower courts of this principle in a criminal case only four years ago. See *United States* v. *Gaudin*, 515 U.S. 506, 510 (1995) (Fifth Amendment and Sixth Amendment "require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged * * *."). The Ninth Circuit apparently needs to be reminded that the same safeguards apply to disputed issues of fact in civil cases tried to a jury.

It is beyond dispute that whether a plaintiff has engaged in protected behavior under the FLSA is an essential element of a claim for retaliation. A claim under Section 15(a)(3) requires proof that "the plaintiff engaged in statutorily protected activity," as well as that "his employer thereafter subjected him to an adverse employment action" that was "a reprisal for having engaged in the protected activities." *Blackie* v. *Maine*, 75 F.3d 716, 722 (1st Cir. 1996). Similarly, Washington law requires proof that "the particular employee's activity" was protected and caused the plaintiff's discharge. *Lins* v. *Children's Discovery Centers*, 976 P.2d 168, 172 (Wash. App. 1999).

If these statutory requirements may be satisfied by showing that one plaintiff complained on behalf of others, then it was incumbent on plaintiffs to prove that this is indeed what occurred, and it was essential that the jury be charged on that

theory of liability. That did not happen here. The fatal defect in the instructions may not be overcome by *post hoc* judicial factfindings that the jury never made and that were far from conclusively established by the evidence.

This issue was repeatedly called to the court of appeals' attention (see Pet. Reh'g at 1-5; Appellants' Opening Brief at 23-25; Reply and Answering Brief at 9-13) but simply swept under the rug in Judge Reinhardt's opinion. It involves millions of dollars of liability for petitioners. The court of appeals' handling of it "so far depart[s] from the accepted and usual course of judicial proceedings" (Sup. Ct. R. 10(a)) and from settled law that it calls for correction through the exercise of this Court's power — indeed, responsibility — to supervise the actions of the lower federal courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1999

APPENDICES

APPENDIX A

LAURA A. LAMBERT; ESTHER ACKLEY; STEVE BELLING; PAT COOKE; LETITIA SELK; AND CHUCK VILTZ,
Plaintiffs-Appellees-Cross-Appellants,

v.

BARRY ACKERLEY; WILLIAM ACKERLEY; SEATTLE SUPERSONICS, INC., A FORMER WASHINGTON CORPORATION; SSI SPORTS, INC., A WASHINGTON CORPORATION; AND FULL HOUSE SPORTS & ENTERTAINMENT, INC., A WASHINGTON CORPORATION,
Defendants-Appellants-Cross-Appellees.

NOS. 96-36017, 96-36266 AND 96-36267.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Feb. 6, 1998.

Decided Oct. 1, 1998.
Rehearing En Banc Granted and
Opinion Withdrawn March 9, 1999.
Argued and Submitted April 22, 1999.
Filed June 10, 1999.

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Jennifer S. Goldstein, U.S. Equal Employment Opportunity Commission, Office of General Counsel, Washington, D.C., for amicus curiae.

Appeal from the United States District Court for the Western District of Washington; Barbara J. Rothstein, District Judge, Presiding. D.C. No. CV-95-00039-BJR.

Before: BROWNING, PREGERSON, REINHARDT, FERNANDEZ, RYMER, T. G. NELSON, TASHIMA, THOMAS, SILVERMAN, WARDLAW, and FLETCHER, Circuit Judges.

REINHARDT, Circuit Judge:

This case presents a question of considerable importance to the workers in this circuit who rely on the protections afforded by the Fair Labor Standards Act ("FLSA" or the "Act"). We must resolve whether the anti-retaliation provision of that Act protects employees who complain to their employers about wage and hour violations. Based on the guiding purpose and design of the FLSA and the language of the statute, we join six other circuits and hold that complaints made to employers are within the ambit of the FLSA's anti-retaliation clause. Because we reject the other arguments that the defendants have raised on appeal, we affirm the decision of the district court.

I.

Facts and Procedural History

The plaintiffs in this action are six former ticket sales agents of the Seattle SuperSonics, a National Basketball Association team. As "account executives" for the Sonics, the plaintiffs were responsible for selling season tickets, multi-game packages, and group-ticket packages. They also were responsible for staffing a season ticket information booth at Sonics basketball games. Beginning in 1991, the agents were paid a base salary of $13,000, and received the

remainder of their compensation through commissions earned for their ticket sales. Rather than paying overtime in accordance with the actual number of hours worked by each employee, the Sonics paid each account executive $2000 per year for "overtime." Under the Sonics' plan, each employee was paid $166.67 per month regardless of the overtime actually worked by the account executive.

In 1993, however, apparently because the Sonics had sold almost all of their tickets, the account executives' workweek was reduced to 20 hours, and the monthly "overtime" payments were discontinued. In 1994, plaintiff Laura Lambert became concerned that she and her fellow account executives had not been paid for all of the overtime hours they had actually worked. Accordingly, in May of 1994, she left a note with Sonics Controller Brian Dixon requesting a meeting to discuss overtime wages. Lambert also telephoned the United States Department of Labor and requested information regarding federal overtime laws. After speaking with the Labor Department, Lambert raised the issue of unpaid overtime with the Sonics head of ticket sales, Bob Boustead. Boustead told Lambert that the overtime question was a "dead issue." According to Lambert's testimony, Boustead also said "[i]f you want to sue the Sonics, go ahead and do us all a favor." (SER 190).

On May 20, 1994, the Department of Labor informed Lambert that the Sonics' overtime scheme did in fact violate the overtime provisions of the Fair Labor Standards Act. Lambert told Dixon of the Labor Department's conclusion and Dixon, according to Lambert's testimony, told her that "his hands were tied" because William Ackerley (Chief Operating Officer of Ackerley Communications, Inc., the corporate parent of the defendant corporations) "will not pay overtime and doesn't care what the laws are." (SER 192-94). Dixon then told Lambert that if she continued to press for her statutory right to overtime pay:

> you will definitely not have a job here, you will be fired. The decision is up to you. Everyone else in the office will love you, but you are jeopardizing your job. Is it worth it to you for a thousand dollars?

(SER 195-96).

In June 1994, the account executives decided that Lambert and plaintiff Chuck Viltz should be their representatives in dealing with the Sonics management. (SER 202). Boustead confirmed that "Chuck and Laura were the spokespersons for the sales folks." (SER 265). Around this same time, Lambert hired an attorney. On June 17, 1994, Lambert's attorney sent Barry Ackerley (CEO and Chairman of the Board of Ackerley Communications) a letter requesting that the Sonics pay Lambert and the other account executives overtime as required by law. The letter also specifically requested that Ackerley instruct his managers "to refrain from retaliation or threats of retaliation against Ms. Lambert and other employees." (ER 118). On July 6, 1994, Lambert's attorney delivered a complaint for unpaid overtime wages to the Sonics.

The Sonics eventually settled the overtime claims with Lambert, and paid the other account executives the amounts due them for overtime. Less than a week later, on October 12, 1994, John Dresel, the Sonics Executive Vice President, wrote a memo to William Ackerley informing him that he was planning to lay off all of the account executives by November 30, 1994. In October of 1994, Full House Sports & Entertainment, Inc. was organized to, among other things, run the Sonics ticket sales operations. Dresel was named as President. In December 1994, Dresel discharged nine of the ten account executives, including the six plaintiffs here. The one sales agent not discharged was the one agent who had never complained about the overtime violations. (SER 271-274).

Following their discharge, the plaintiffs filed suit, alleging that they had been fired in retaliation for their complaints

about the defendants' failure to comply with federal overtime requirements, in violation of the FLSA, 29 U.S.C. § 215(a)(3), and in violation of the public policy of the state of Washington. Wash. Rev.Code § 49.46.100(2). Following a three-week trial, the jury returned a verdict for the plaintiffs on both the federal and state causes of action and awarded $697,000 for lost wages, and $75,000 to each plaintiff for emotional distress. The jury further awarded $12 million in punitive damages on the FLSA claim.[1] The defendants moved for judgment as a matter of law, or in the alternative for a new trial and/or a remittitur of damages. The district court remitted the punitive damages award to $4,182,000, but denied all other defense motions. The district court also awarded the plaintiffs $389,117.50 in attorneys' fees, and later awarded them an additional $44,075 in supplemental fees in connection with the post-trial motions.

The defendants appealed the district court's denial of their motion for judgment as a matter of law, and a three-judge panel of this court reversed with respect to the federal claim on the ground that the anti-retaliation provision of the FLSA does not apply to complaints made to an employer. The panel then affirmed in part on the state claim and remanded it for further proceedings. See *Lambert* v. *Ackerly*, 156 F.3d 1018 (1998), *withdrawn and reh'g en banc granted*, 169 F.3d 666 (9th Cir.1999). The plaintiffs filed a suggestion for rehearing en banc, and a majority of the non-recused active judges of this court voted to rehear the case en banc in order to consider the scope of the anti-retaliation provision of the FLSA. Having withdrawn the panel opinion, we now affirm the judgment of the district court on the federal cause of action.[2]

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[1] The district court's jury instruction allowed punitive damages to be assessed only for a violation of the federal law. (SER 33).

[2] Because we uphold the judgment in favor of the plaintiffs under the FLSA, and because greater relief was awarded under that statute

II.

The Reach of the Anti-Retaliation Provision

The Fair Labor Standards Act anti-retaliation provision provides that it is unlawful:

> [T]o discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

29 U.S.C. § 215(a)(3). In this case, we must determine whether the FLSA's prohibition on terminating an employee who has "filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter" protects an employee who complains to his employer about violations of the Act. The district court, in denying the defendants' motion for judgment as a matter of law, held that the statute extends protection to employees who make such complaints. The defendants contend, to the contrary, that the anti-retaliation provision protects only those employees who file formal proceedings with the Department of Labor or in a federal court. Our court has never before addressed this question, although we did reserve it in *Knickerbocker* v. *City of Stockton*, 81 F.3d 907, 912 n.3 (9th Cir.1996). To date, however, seven other Circuits have reached the specific question raised here. The First, Third, Sixth, Eighth, Tenth, and Eleventh circuits have all held that complaints similar to, and even far more "informal" than those lodged by the plaintiffs here entitle the employee to coverage under the anti-retaliation provision of the FLSA. See *Valerio* v. *Putnam Assocs. Inc.*, 173 F.3d 35 (1st Cir.1999); *Brock* v. *Richardson*,

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than is available under the state cause of action, we need not determine the validity of the judgment on the state claim.

812 F.2d 121, 124-25 (3d Cir.1987); *EEOC* v. *Romeo Community Schools*, 976 F.2d 985, 989 (6th Cir.1992); *Brennan* v. *Maxey's Yamaha, Inc.*, 513 F.2d 179, 181 (8th Cir. 1975); *Love* v. *RE/MAX of Am., Inc.*, 738 F.2d 383, 387 (10th Cir. 1984); *EEOC* v. *White & Son Enterprises*, 881 F.2d 1006, 1011 (11th Cir.1989). The Second Circuit is the only circuit to reach the contrary conclusion, although it did so in a case in which the only complaint made was an oral complaint to a supervisor that a pay disparity was "not fair." See *Lambert* v. *Genesee Hosp.*, 10 F.3d 46, 55 (2d Cir.1993).

Over fifty years ago, the Supreme Court determined the approach that must be followed in construing the provisions of the Fair Labor Standards Act. A number of the other circuits have explicitly followed that approach. It is a simple one, often used in construing statutes designed to protect individual rights. In *Tennessee Coal, Iron & R. Co.* v. *Muscoda Local No. 123*, 321 U.S. 590, 597, 64 S.Ct. 698, 88 L.Ed. 949 (1944), the Court explained that because the FLSA is a remedial statute, it must be interpreted broadly. As the *Tennessee Coal* Court wrote:

> [The FLSA is] remedial and humanitarian in purpose. We are not here dealing with mere chattels or articles of trade but with the rights of those who toil. . . . Those are rights that Congress has specifically legislated to protect. Such a statute must not be interpreted or applied in a narrow, grudging manner.

Id. (emphasis added). More specifically, in *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292-93, 80 S.Ct. 332, 4 L.Ed.2d 323 (1960), the Court explained that Congress intended the anti-retaliation provision of the FLSA to provide an incentive for employees to report wage and hour violations by their employers. As the Court wrote:

> For weighty practical and other reasons, Congress did not seek to secure compliance with prescribed standards through continuing detailed federal supervision or

> inspection of payrolls. Rather it chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied.... [I]t needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions.

Id. at 292, 80 S.Ct. 332.

The implication of *Tennessee Coal* and *Mitchell* is clear. Based on the principles illustrated by these two cases, the Third Circuit, for example, concluded that "the [Supreme] Court has made clear that the key to interpreting the [FLSA's] anti-retaliation provision is the need to prevent employees' 'fear of economic retaliation' for voicing grievances about substandard conditions." *Brock*, 812 F.2d at 123-24. The Eleventh Circuit has similarly held that "[t]he anti-retaliation provision of the FLSA was designed to prevent fear of economic retaliation by an employer against an employee who chose to voice such a grievance," and that "[b]y giving a broad construction to the anti-retaliation provisions to include [informal complaints made to employers], its purpose will be further promoted." *White & Son*, 881 F.2d at 1011. Most recently, the First Circuit reached the following conclusion:

> A narrow construction of the anti-retaliation provision could create an atmosphere of intimidation and defeat the Act's purpose in § 215(a)(3) of preventing employees' attempts to secure their rights under the Act from taking on the character of 'a calculated risk.' Such circumstances would fail to 'foster a climate in which compliance with the substantive provisions of the Act would be enhanced.' Hence we, like many of our sister circuits, conclude that the animating spirit of the Act is best served by a construction of § 215(a)(3) under which the filing of a relevant complaint with the employer no less than with a court or agency may give rise to a retaliation claim.

Valerio, 173 F.3d at 43 (quoting *Mitchell*, 361 U.S. at 292, 293, 80 S.Ct. 332).

We agree with the other circuits that have given a broad construction to the statutory provision. The FLSA's anti-retaliation clause is designed to ensure that employees are not compelled to risk their jobs in order to assert their wage and hour rights under the Act. Construing the anti-retaliation provision to exclude from its protection all those employees who seek to obtain fair treatment and a remedy for a perceived violation of the Act from their employers would jeopardize the protection promised by the provision and discourage employees from asserting their rights. As is obvious from this very case, such a construction would leave employees completely unprotected by the FLSA against retaliatory discharge when they complain to their employers about violations of the Act — exactly what the anti-retaliation provision was designed to prevent. We hold, therefore, that in order for the anti-retaliation provision to ensure that "fear of economic retaliation" not "operate to induce aggrieved employees quietly to accept substandard conditions," *Mitchell*, 361 U.S. at 292, 80 S.Ct. 332, it must protect employees who complain about violations to their employers, as well as employees who turn to the Labor Department or the courts for a remedy.

Although possibly subject to differing interpretations, the language of § 215(a)(3) is fully consistent with this conclusion. By its terms, the anti-retaliation provision prohibits retaliation against an employee who has "filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter." 29 U.S.C. § 215(a)(3). First, we conclude that "any complaint" related to the FLSA includes complaints made to employers. If "any complaint" means "any complaint," then the provision extends to complaints made to employers. Second, we are also convinced that the statutory term "filed" includes the filing of complaints with employers. When drafting the language of

§ 215(a)(3), it is reasonable to assume that Congress was aware of the practice, in many union and non-union workplaces, of requiring employees to "file" grievances and complaints with their union and/or employer before instituting any further internal or external proceedings. Given the widespread use of the term "file" to include the filing of complaints with employers, it is therefore reasonable to assume that Congress intended that term as used in § 215(a)(3) to include the filing of such complaints. Finally, we note that § 215(a)(3) protects employees who file complaints "under or related to this chapter." The defendants' construction of the statute would render the "or related to" language superfluous. As we read the statute, complaints filed "under" the FLSA are those complaints provided for in the Act, *i.e.*, those complaints filed with the Department of Labor or the federal court as specified in the Act. Complaints that are not "under" the FLSA but are "related to" it, on the other hand, are those complaints filed outside of court and the Department of Labor that relate to the subject matter of the FLSA, for example, those complaints filed with an employer. In sum, the statutory grant of protection to employees who "file[ ] any complaint" "related to" the FLSA extends to employees who complain to their employer about an alleged violation of the Act.[3]

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[3] The construction we give § 215(a)(3) is also dictated by our decision in *MacKowiak* v. *University Nuclear Sys., Inc.*, 735 F.2d 1159 (9th Cir.1984), where we held that a similar, although facially more restrictive, anti-retaliation provision of the Energy Reorganization Act ("E.R.A.") extended protection to employees filing complaints with an employer. The E.R.A. provision applied when an employee:

> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter ...;
>
> (2) testified or is about to testify in any such proceeding or;

The defendants rely on the fact that Title VII's anti-retaliation provision, 42 U.S.C. § 2000e-3(a), contains language broader in scope than the language contained in the FLSA provision. In *Genesee*, the Second Circuit reached the conclusion that the FLSA does not protect employees who complain internally to their employers by contrasting § 215(a)(3) with Title VII's anti-retaliation provision. See *Genesee*, 10 F.3d at 55. With all due respect to the Second Circuit, we disagree that the breadth of Title VII's anti-retaliation provision dictates the construction we should give the FLSA provision. The FLSA was drafted some sixty-two years ago, at a time when statutes were far shorter and less detailed, and were written in more general and simpler terms. The fact that Congress decided to include a more detailed anti-retaliation provision more than a generation later, when it drafted Title VII, tells us little about what Congress meant at the time it drafted the comparable provision of the FLSA. In short, we find the view suggested by the

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(3) assisted or participated or is about to participate in any manner in such a proceeding.

42 U.S.C. § 5851(a)(1982). In reaching our holding in *MacKowiak*, we noted that the Energy Reorganization Act's anti-retaliation provision has the "broad, remedial purpose of protecting workers from retaliation." *Id.* at 1163. As we have shown, the same is true of the FLSA. See, *e.g.*, *Tennessee Coal*, 321 U.S. at 597, 64 S.Ct. 698. The *MacKowiak* court also observed that "[i]f the regulatory scheme is to function effectively, inspectors must be free from the threat of retaliatory discharge for identifying safety and quality problems." 735 F.2d at 1163. The same need to be free from threats of retaliatory discharge exists with respect to the FLSA, if that statute is to "function effectively." *Id.* It follows, a fortiori, from our holding in *MacKowiak* that a statute like the FLSA that (1) expressly covers the filing of complaints, and is not limited to the institution of actual proceedings, and (2) applies to actions related to, and not just commenced under, the Act covers internal complaints filed with employers.

defendants — that Congress' choice of words in 1964 can resolve the meaning of words chosen in 1937 — to be unpersuasive.[4]

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[4] Equally unpersuasive is the defendants' argument regarding the 1985 amendments to the FLSA. See 99 Stat. 787 § 8. The amendments, passed in response to the Supreme Court's determination that the FLSA applies to states and municipalities, see *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985), contained a provision dictating that states and municipalities may not discriminate against any employee "because on or after February 19, 1985 [the date of Garcia], the employee asserted coverage under section 7 of the Fair Labor Standards Act." The amendment went on to state that "[t]he protection against discrimination afforded by the preceding sentence shall be available after August 1, 1986, only for an employee who takes an action described in section 15(a)(3) of such Act." The defendants argue that the phrase "asserted coverage" expanded the range of parties to whom protected complaints could be made (e.g., employers, not just courts and agencies), and that such expansive coverage terminated on August 1, 1986. We disagree. The most natural reading of the amendment is that it temporarily extended protection to employees who "asserted" that their state and municipal employers were "cover[ed]" by the Act during the initial period following a controversial and hotly disputed Court decision. For example, the amendment extended protection to union representatives and others who, during the post-*Garcia* period of adjustment, attempted to persuade a local government agency that it was subject to the FLSA. Following the initial period of adjustment, however, only complaints regarding specific violations of the Act were covered, i.e., complaints covered by § 215(a)(3). Contrary to the defendants' assertion, therefore, the 1985 amendment effected a temporary expansion of the subject matter of complaints protected by the Act. The amendment said nothing, however, about the range of parties to whom protected complaints could be made. Accordingly, the amendment is irrelevant to our analysis here.

Our decision today is in line with the routine construction given similar anti-retaliation provisions by the federal courts of appeals. In *Phillips* v. *Interior Bd. of Mine Operations Appeals*, 500 F.2d 772 (D.C.Cir.1974), for example, the D.C. Circuit held that the whistle-blower provision of the Federal Mine Health and Safety Act ("FMHSA") covers complaints made to employers. The FMHSA provision is analogous to, although again more limited than, the FLSA provision.[5] Despite the absence of express language in the statute extending protection to employees who complain to their employer, the D.C. Circuit held that "the coverage of the Act begins when the miner notifies his foreman and/or safety committeeman of possible safety violations." *Id.* at 778 (emphasis added).[6]

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[5] The FMHSA provision applies on its face only to governmental proceedings. It reads:

> No person shall discharge or in any way discriminate or cause to be discharged or discriminated against any miner or any authorized representative of miners by reason of the fact that such miner or representative (A) has notified the Secretary or his authorized representative of any alleged violation or danger, (B) has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or (C) has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

30 U.S.C. § 820(b)(1) (cited in *id.* at 777 n.17).

[6] Significantly, in reaching this holding, the court pointed out that:

> The parallels between the Mine Safety Act and other protective labor acts are significant. The Safety Act provision which we here construe was introduced with the announced intention of giving to miners 'the same protection against retaliation which we give employees under other Federal labor laws.' Specifically, the ... Fair Labor Standards Act....

In *Rayner* v. *Smirl*, 873 F.2d 60, 64 (4th Cir.1989), the Fourth Circuit reached the same conclusion with respect to the Federal Railroad Safety Act, a statute with an anti-retaliation provision indistinguishable from the FLSA's.[7] Again, although the anti-retaliation provision of this Act lacked explicit reference to complaints made to employers, the court concluded that it protected such complaints. As the *Smirl* court wrote, "[t]he distinction between intra-corporate complaints and those made to outside agencies is . . . an artificial one. Both serve to promote rail safety and both are within the contemplation of § 441." *Id.* at 64.

In *Passaic Valley Sewerage Comm'rs* v. *Department of Labor*, 992 F.2d 474 (3rd Cir.1993), moreover, the Third Circuit held that the Clean Water Act's whistle-blower provision extended protection to employees who complain to their employer. See *id.* at 478.[8] In an eloquent decision, the

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Id. at 782 (quoting 115 Cong.Rec. 27948 (1969)).

[7] The relevant section of that Act read:

> A common carrier by railroad ... may not discharge or in any manner discriminate against any employee because such employee ... (1) filed any complaint or instituted or caused to be instituted any proceeding under or related to the enforcement of the Federal railroad safety law; or (2) testified or is about to testify in any such proceeding.

45 U.S.C. § 441(a).

[8] The language of the statute was, again, more limited than that of the FLSA. Section 507(a) of the Clean Water Act provides:

> No person shall fire, or in any other way discriminate against ... any employee ... by reason of the fact that such employee ... has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the [Clean Water Act].

Third Circuit wrote with respect to the Clean Water Act's provision:

> The whistle-blower provision was enacted for the broad remedial purpose of shielding employees from retaliatory actions taken against them by management to discourage or to punish employee efforts to bring the corporation into compliance. . . . If the regulatory scheme is to effectuate its substantive goals, employees must be free from threats to their job security in retaliation for their good faith assertions of corporate violations of the statute. Section 507(a)'s protection would be largely hollow if it were restricted to the point of filing a formal complaint with the appropriate external law enforcement agency. Employees should not be discouraged from the normal route of pursuing internal remedies before going public with their good faith allegations.

Id. at 478 (emphasis added).[9]

As the above discussion demonstrates, federal courts have consistently construed anti-retaliation provisions analogous to the FLSA's as extending protection to complaints made by employees to their employers. By holding that the anti-retaliation provision of the FLSA similarly extends protection to employees who complain of alleged violations to

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33 U.S.C. § 1367(a).

[9] The list goes on. See, *e.g.*, *Clean Harbors Envtl. Servs., Inc.* v. *Herman*, 146 F.3d 12 (1st Cir.1998) (construing analogous anti-retaliation provision of the Surface Transportation Assistance Act to include internal employee complaints); *Bechtel Constr. Co.* v. *Secretary of Labor*, 50 F.3d 926, 931-33 (11th Cir. 1995) (construing the Energy Reorganization Act anti-retaliation provision as extending to internal employee complaints); *Kansas Gas & Elec. Co.* v. *Brock*, 780 F.2d 1505, 1510-12 (10th Cir.1985) (same).

their employers, we follow a course well tread both by our court and the other circuits.[10]

Of course, in order to find protection under § 215(a)(3), an employee must actually communicate a complaint to the employer. In *Valerio*, after holding that § 215(a)(3) extends to complaints filed with an employer, the First Circuit went on to state that "not all abstract grumblings will suffice to constitute the filing of a complaint with one's employer," and that "'[t]here is a point at which an employee's concerns and comments are too generalized and informal to constitute 'complaints' that are 'filed' with an employer within the meaning of the [statute].'" 173 F.3d 35 at 44 (quoting *Clean Harbors*, 146 F.3d at 22). We agree that not all amorphous expressions of discontent related to wages and hours constitute complaints filed within the meaning of § 215(a)(3). The actions taken by the plaintiffs here, however, were in no way amorphous and, given our holding today, clearly constitute the filing of a complaint within the meaning of the statute. Again, the plaintiffs not only complained orally to their employers about the failure to pay adequate overtime wages, and specifically alleged a violation of the FLSA, they also contacted the Department of Labor (which informed them that

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[10] We reject the defendants' argument that the cases we have cited are inapposite because they involve health or safety while the present case involves economic rights. First, the defendants' contention misses the central point that the anti-retaliation provisions of all these statutes have analogous purposes. As the D.C. Circuit noted in Phillips, the safety statutes at issue were designed to give employees "the same protection against retaliation" as afforded by the FLSA. 500 F.2d at 782. Second, we disagree that clean water, for example, see, *e.g.*, *Passaic Valley*, 992 F.2d at 478, is necessarily a more important or more pressing objective than ensuring that workers receive the minimum wages which the law guarantees them. Certainly, Congress has made no such determination.

their employer's practices were illegal), hired an attorney to assist them with their claim, and notified their employer in writing of the specific FLSA violation they were alleging.

While these actions unquestionably amount to the filing of a complaint within the meaning of § 215(a)(3), less formal and detailed communications also fit the statutory definition. Although we need not, and indeed could not, describe the minimum specificity with which an employee must assert an alleged FLSA violation in order to find protection under § 215(a)(3) — and we agree with the First Circuit that such questions are to be resolved as a matter of factual analysis on a case-by-case basis — it is clear that so long as an employee communicates the substance of his allegations to the employer (e.g., that the employer has failed to pay adequate overtime, or has failed to pay the minimum wage), he is protected by § 215(a)(3). As several circuits have held, moreover, the employee may communicate such allegations orally or in writing, and need not refer to the statute by name. See, *e.g.*, *Romeo Community Schs.*, 976 F.2d at 989 (employee who communicated substance of allegations to employer and stated that she believed the employer was "breaking some sort of law," is protected by § 215(a)(3)).

In short, § 215(a)(3) protects from retaliation employees who complain to their employer about alleged violations of the Act. Accordingly, the plaintiffs here engaged in protected conduct and stated a valid claim under the FLSA.

III.

Remaining Claims

A. Liability Instruction

Having resolved the central issue raised by this appeal, we now address the defendants' remaining claims. The defendants first argue that the district court erred in instructing the jury on mixed-motives liability under the FLSA. At trial, the defendants argued that the plaintiffs were discharged not

because they complained about overtime violations, but because the Sonics, on account of purely economic considerations, needed to "restructure" their ticket sales operations. The jury was instructed that in order to prevail on their retaliation claim, the plaintiffs had to show:

1. That the defendant was aware of one or more plaintiffs' participation in protected activity;

2. That an adverse employment action was taken against the plaintiffs; and

3. That the protected activity was a substantial motivating factor in the adverse employment action as to that plaintiff.

(SER 20). Relying on *Knickerbocker* v. *City of Stockton*, 81 F.3d 907, 911 (9th Cir.1996), the defendants contend that the district court erred by failing to give an affirmative defense instruction; namely, that the defendants could escape liability by proving that "the plaintiffs would have been discharged regardless of any protected activity." (Opening Brief at 27). We need not decide whether the district court erred, however, because we conclude that any error was "more probably than not harmless." See, *e.g.*, *Mockler* v. *Multnomah County*, 140 F.3d 808, 812 (9th Cir.1998).

As we have explained on numerous occasions, an error in instructing the jury in a civil case does not require reversal if the error was "more probably than not harmless." *Coursen* v. *A.H. Robins Co.*, 764 F.2d 1329, 1337 (9th Cir.1985).[11] In *Benigni* v. *City of Hemet*, 879 F.2d 473, 480 (9th Cir.1988), we held that the district court's failure to give an instruction requested by the defendant was harmless because "the

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[11] The harmless error standard applied in civil cases is far "less stringent" than that applied in criminal cases. *Mockler*, 140 F.3d at 813.

evidence would have supported a verdict for the plaintiff even with th[e requested] instruction." The same is true here.

The evidence clearly supports the conclusion that the defendants would not have discharged the plaintiffs in the absence of the protected conduct. First, the jury heard testimony that Brian Dixon, the Sonics Controller and the person in charge of finance for the organization, had told Lambert that she would "definitely not have a job" and would "be fired" if she continued to press for her rights under the FLSA. (SER 195-96).[12] Such direct evidence, rare as it may be in mixed-motives cases, strongly supports the determination that the Sonics fired the plaintiffs because of their protected conduct, and that they would not have done so in the absence of the overtime complaints. Second, the jury had before it evidence that the entire sales group was fired except for the one agent who did not complain about the overtime violations.[13] This evidence makes it wholly implausible that the discharges were the result of a "restructuring" driven by economic considerations. Third, the jury had before it evidence that immediately after the discharge of the entire sales staff (except Novak), the Sonics announced new job openings for Ticket Sales Account Executives with job descriptions identical to those previously held by the plaintiffs. (SER 161). Had the discharges actually been based on an

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[12] The district court admitted Lambert's testimony regarding Dixon's statements after rejecting an objection raised in an in limine motion. The court did not abuse its discretion in admitting the evidence as Dixon was an agent of the defendants at the time he made the statements. See Fed.R.Evid. 801(d)(2)(D); see also *Hoptowit* v. *Ray*, 682 F.2d 1237, 1262 (9th Cir.1982).

[13] The record makes clear that the only member of the sales staff not fired was Randy Novak. Plaintiff Letitia Selk testified that Novak had never complained about the overtime violations, and had never associated himself with the group of sales agents who had expressed concern over these violations. (SER 271-72).

economic need to "restructure" ticket sales operations, it is unclear why these plaintiffs would have been discharged and replaced in identical jobs by other sales agents. The alacrity with which the new job postings were listed suggests strongly that the motivation behind the discharges was retaliation and not a need for economic restructuring.

In short, the evidence before the jury strongly supports the conclusion that the plaintiffs were discharged in retaliation for their overtime complaints and that they would not have been discharged had they not engaged in this protected conduct. Under these circumstances, any instructional error was more probably than not harmless. See ***Benigni***, 879 F.2d at 480.

There is another reason why we conclude that the failure to give the instruction requested by the defendants was at most harmless error — that is, the jury's decision to award $12 million in punitive damages. In several cases we have held an instructional error regarding liability to be harmless in light of a punitive damages award. See, *e.g.*, *Larez* v. *Holcomb*, 16 F.3d 1513, 1518 (9th Cir.1994); see also ***Benigni***, 879 F.2d at 480. In *Larez*, for example, the plaintiff brought a § 1983 action alleging that she had been arrested and held without probable cause. After the jury returned a verdict for the plaintiff, the defendant appealed and argued that the court had erred in instructing the jury as to the burden of proving that *Larez* had voluntarily consented to the detention. Although we concluded that the court's instruction was erroneous, we held that the error was harmless in light of the jury's award of punitive damages. As we explained:

> [I]t is highly significant that, in this case, the jury not only found Holcomb liable, but also assessed a punitive award against him. In order to award any punitive damages, the jury had to find that Holcomb had engaged in 'extraordinary misconduct.' The court's instruction on this point was unambiguous. The jury's implicit finding

> of extraordinary misconduct provides a strong indication that the jury did not find Holcomb's account [of the events underlying the plaintiff's allegations] persuasive.

Id. at 1518.

As in *Larez*, the court's punitive damages instruction here was unambiguous. In order to award punitive damages, the jury had to find that "the defendants' conduct was malicious, or in reckless disregard of plaintiffs' rights." (SER 33). The court explained that "in this context, conduct is malicious if it is accompanied by ill will, or spite, or if it is for the purpose of injuring another. Conduct is in reckless disregard of a party's rights if, under the circumstances, it reflects complete indifference to the rights of others." (SER 33). The jury's award of $12 million in punitive damages reflects its determination that, in discharging the plaintiffs, the defendants acted maliciously, or in reckless disregard of the plaintiffs' rights; that the discharge was for the purpose of injuring the plaintiffs, or that it reflected a complete indifference to the plaintiffs' rights. Given this determination, it is, at the least, more likely than not that the jury did not believe the defendants' explanation for the discharges. That is, given the award of punitive damages, it is more likely than not that the jury simply did not believe that the discharges were driven, in whole or in part, by economic restructuring. In fact, the punitive damages award makes it quite plain that the jury concluded that the defendants would not have discharged the plaintiffs in the absence of protected conduct. Accordingly, for this reason also, the district court's failure to instruct the jury that the defendants could escape liability by proving that they "would have taken the adverse action if the proper reason alone had existed," *Knickerbocker*, 81 F.3d at 911, was at most harmless error. See *Mockler*, 140 F.3d at 812.

B. Liability as to the other plaintiffs

The defendants next argue that even if Lambert's actions were protected by § 215(a)(3), there was no evidence that the

remaining plaintiffs complained about overtime violations. Accordingly, the defendants argue, there is no evidentiary support for the jury's verdict that these plaintiffs were discharged in retaliation for protected activity. In denying the defendants' motion for judgment as a matter of law on this ground, the district court concluded that the plaintiffs had complained about the overtime violations as a group and that Lambert had acted in a representative capacity when she filed her complaints with the employer. We agree with the district court that Lambert complained on behalf of the named plaintiffs and that sufficient evidence was therefore presented to support a retaliation claim with respect to all the plaintiffs.[14]

Perhaps most important, the original letter sent to the Sonics by Lambert's attorney referred both to Lambert's overtime complaints and to those of her co- workers. For instance, the letter stated that "when Ms. Lambert and other employees have inquired about overtime compensation, managers have told them that overtime compensation is not required." (SER 117). The letter went on to explain that "[t]he Department [of Labor] told Ms. Lambert that she and other employees are entitled to one and one-half times their regular rate of pay for each hour over forty worked in a week." (SER 117). The letter concluded with this request: "[W]e ask that you instruct your managers to refrain from retaliation or threats of retaliation against Ms. Lambert and other employees." (SER 118). In short, Lambert's complaints were lodged not only on her own behalf, but on behalf of the rest of the ticket sales staff, including all of the plaintiffs here. The defendants had direct and specific notice that Lambert and

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[14] We note that the three-judge panel that initially heard this case also concluded that Lambert had acted in a representative capacity when she filed her overtime complaints with the employer. See *Lambert* v. *Ackerly*, 156 F.3d 1018, 1024 (9th Cir.1998), *reh'g en banc granted and opinion withdrawn*, 169 F.3d 666 (9th Cir.1999).

her co-workers were making demands for overtime compensation in accordance with the FLSA.

The testimony of both plaintiff and defense witnesses supports this conclusion. At trial, Lambert testified she and plaintiff Chuck Viltz acted as representatives of the group of sales agents. She stated that "[t]he sales staff as a whole decided to have two members of the sales staff go and talk to the director of sales and the vice-president of sales and sponsorship, and Chuck Viltz and I were picked to do that." (SER 202). The defendants confirmed Lambert's account. For example, Bob Boustead, the Sonics head of ticket sales, testified that "Chuck [Viltz] and Laura [Lambert] were the spokespersons for the sales folks." (SER 265). Dresel, the Sonics Vice President, testified that it was difficult for him to distinguish amongst the plaintiffs because "the whole group is now lumped together." (ER 264). Finally, in his opening statement to the jury, the defendants' counsel referred to Lambert as the plaintiffs' "ringleader." (SER 163). As the evidence supports the conclusion that Lambert was acting on behalf of the plaintiffs as a group, the jury's verdict on behalf of each plaintiff is sound.

C. Damages

The defendants also object to two parts of the damages award. They first contend that punitive damages are not available under the FLSA.[15] The only circuit to address this question has concluded that punitive damages are available under the Act. See *Travis* v. *Gary Comm. Mental Health Ctr., Inc.*, 921 F.2d 108, 112 (7th Cir.1990). Although the

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[15] The defendants also argue that the award of punitive damages was excessive. The district court remitted a $12 million award to just over $4 million. In light of the conduct engaged in by the defendants and in light of the defendants' substantial financial assets, the $4 million award that the plaintiffs ultimately accepted was not, by any means, excessive.

Seventh Circuit's reasoning is persuasive, we do not reach the question because the defendants have waived the issue of the availability of punitive damages by failing to raise it below. Indeed, the defendants proposed the punitive damages instruction that was ultimately delivered by the district court, and never objected to the instruction after they proposed it. Although the defendants contended that no punitive damages instruction was "necessary," and although their trial brief stated that punitive damages "should not be allowed," the district court reasonably construed these statements as arguments that these particuiar plaintiffs had not made out a sufficient case of malice and/or recklessness to warrant an award of punitive damages. (ER 79-80). We agree with the district court, and conclude that the defendants failed to raise any objection that punitive damages are not available under the FLSA. We therefore treat the argument as waived.

The defendants next contend that the award of damages for emotional distress was excessive, and that the award was the product of passion and prejudice. We may reverse a jury's finding of the amount of damages if the amount is grossly excessive or monstrous, see, *e.g.*, *Los Angeles Mem'l Coliseum Comm'n* v. *NFL*, 791 F.2d 1356, 1360 (9th Cir. 1986). The jury awarded each plaintiff $75,000 in emotional distress damages. Each plaintiff testified to the emotional toll that the illegal discharge had taken on his or her life. Given the evidence that was before the jury, we cannot conclude that the award of emotional distress damages was either grossly excessive or monstrous. *Los Angeles Mem'l Coliseum*, 791 F.2d at 1360.

The defendants' argument that the award was based on passion or prejudice depends entirely on the fact that each plaintiff was awarded the same amount of emotional distress damages. A review of the evidence, however, demonstrates that the emotional distress suffered by each plaintiff was, in fact, quite similar. We agree with the district court, moreover, that the jury likely concluded that the emotional harm to each

plaintiff was roughly equal given the similar treatment each plaintiff suffered at the hands of the defendants. (ER 94). Accordingly, we also reject the defendants' argument that the emotional distress award was the result of passion or prejudice.

D. Individual Defendants

The defendants' final contention concerns the individual defendants William and Barry Ackerley. Their first argument is that the Ackerleys cannot be liable for the discharges because they are not "employers" within the meaning of the FLSA.[16] We have held that the definition of "employer" under the FLSA is not limited by the common law concept of "employer," but "is to be given an expansive interpretation in order to effectuate the FLSA's broad remedial purposes." *Bonnette* v. *California Health & Welfare Agency*, 704 F.2d 1465, 1469 (9th Cir.1983). Where an individual exercises "control over the nature and structure of the employment relationship," or "economic control" over the relationship, that individual is an employer within the meaning of the Act, and is subject to liability. *Id.* at 1470. The district court instructed the jury that it could find the individual Ackerleys liable only if it determined that they had a "significant ownership interest with operational control of significant aspects of the corporation's day-to-day functions; the power to hire and fire employees; [the power to] determin[e][ ]salaries; [the responsibility to] maintain [ ] employment records." (SER 25). This instruction is entirely consistent with our interpretation of "employer" under the FLSA, and was in no way erroneous. See *Bonnette*, 704 F.2d at 1468-70. The evidence, moreover, strongly supports the jury's

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[16] Although their arguments are not altogether clear, the defendants appear to object to the jury instruction on this point, and to allege that there was insufficient evidence to support a finding that the Ackerleys were employers within the meaning of the Act.

determination that both Ackerleys exercised economic and operational control over the employment relationship with the sales agents, and were accordingly employers within the meaning of the Act.

The defendants also argue there was insufficient evidence to support an award of punitive damages against these individual defendants. We cannot disturb the jury's verdict if it is supported by substantial evidence. See, *e.g.*, *Murray* v. *Laborers Union Local 324*, 55 F.3d 1445, 1452 (9th Cir. 1995). Substantial evidence is "such reasonable evidence as reasonable minds might accept as adequate to support a conclusion even if it is possible to draw two inconsistent conclusions from the evidence." *Landes Constr. Co.* v. *Royal Bank of Canada*, 833 F.2d 1365, 1371 (9th Cir.1987). The record makes clear that the jury's award of punitive damages against the Ackerleys was supported by substantial evidence. The jury heard testimony that the Ackerleys had a long-standing policy of refusing to pay overtime as required by federal law. (SER 279-80). Indeed, the jury was informed that the Ackerleys had been the subject of a previous federal lawsuit for overtime violations. (ER 86). The jury also heard extensive testimony that both Ackerleys were aware of and participated in the overtime dispute with the plaintiffs here, and were involved in the decision to terminate the sales staff. For example, the letter from Lambert's attorney was hand-delivered to Barry Ackerley's office, and Dresel's notes from a June 22nd meeting at which the overtime complaints were discussed stated that "Barry [was] being told." (ER 121). Finally, the jury heard testimony that William Ackerley had told his chief financial officer that he "doesn't care what the laws are," that he believed "the law was not made for [his] business," and that he would not pay overtime but would "wait until someone sues [him]." (SER 194). Such evidence reasonably supports the jury's determination that the Ackerleys acted with reckless disregard for the plaintiffs' rights. There

was, accordingly, sufficient evidence to support the award of punitive damages against the individual defendants.

IV.

Attorneys Fees

Following trial, the district court awarded the plaintiffs $389,117.50 in attorneys fees. Following the resolution of the post-trial motions, the plaintiffs applied for $141,080 in supplemental fees, and the district court awarded them $44,075. The plaintiffs cross-appeal the district court's supplemental award, claiming that the court abused its discretion by failing to award them the full $141,080 requested. Parties are entitled to fees only for work related to issues on which they prevail, and here the plaintiffs failed to prevail on an extremely important post-trial issue — the remittitur with respect to punitive damages. The district court's fee awards were all carefully considered, and the court did not abuse its discretion by awarding the plaintiffs only $44,075 in supplemental fees. We therefore affirm the fee awards.

V.

Conclusion

The plaintiffs were discharged in retaliation for activity protected by the Fair Labor Standards Act. Accordingly, the judgment of the district court is affirmed in all respects. Interest shall be awarded from the date of final judgment.

AFFIRMED.

RYMER, Circuit Judge, with whom FERNANDEZ, Circuit Judge, joins, dissenting in part and concurring in the judgment in part:

While the majority's view that 29 U.S.C. § 215(a)(3) protects employees who complain to an employer about overtime may well modernize the FLSA, I believe this is for

Congress-not the courts-to do. And I continue to agree with the panel opinion, and the Second Circuit, that this interpretation is an option the plain language of § 215(a)(3) makes unavailable. Section 215(a)(3) says that it is unlawful to discharge an employee because he or she "has filed any complaint." It does not say "has complained to the employer" or "has made any complaint to the employer."[1]

Washington law does say that. It prohibits an employer from discharging an employee who "has made any complaint to his employer." Wash. Rev.Code § 49.46.100(2).[2]

If the federal statute and the state statute mean the same thing, as the court has now held, then words mean anything we say they do.[3] I therefore dissent for the reasons set forth in Parts II, III and IV of the panel opinion, authored by Judge Brunetti, which I adopt:[4]

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[1] Nor does it matter whether or not Congress meant to include grievances "filed" with the employer, as the majority suggests, for no such thing happened in this case. More importantly, the jury was instructed (and so could have returned its verdict based on finding) that complaining to an employer or requesting information from the government suffices.

[2] See infra note 6 for full statutory text.

[3] See Lewis Carroll, *Through the Looking Glass*. As Humpty Dumpty responded to Alice's question "whether you can make words mean so many different things," "The question is ... which is to be master-that's all."

[4] Judge Kleinfeld and I joined the opinion, Parts II, III and IV of which I reproduce in full here because the opinion was automatically withdrawn pursuant to our rules when the court voted to rehear the case en banc. I concur in the judgment to the extent that it affirms on liability and wages, but I would do so only under Washington law.

II. Liability

The plaintiffs alleged that they were retaliated against in violation of both the federal FLSA and the public policy of the state of Washington. We [would] now hold that the plaintiffs failed to state a valid claim under federal law, but were properly allowed to proceed with their claims under Washington law.

A. Retaliation for Informal Complaints Is Not Covered Under the FLSA

The FLSA's anti-retaliation provision makes it unlawful "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee." 29 U.S.C. § 215(a)(3). Defendants urge us to strictly construe this provision, so as to exclude the present plaintiffs' informal complaints from its coverage.

"As in all cases of statutory interpretation, our starting point in determining Congress's intent must be the language of the statute itself." *Fernandez* v. *Brock*, 840 F.2d 622, 632 (9th Cir.1988); *Dunn* v. *CFTC*, 519 U.S. 465, 117 S.Ct. 913, 916, 137 L.Ed.2d 93 (1997) ("[A]bsent any 'indication that doing so would frustrate Congress's clear intention or yield patent absurdity, our obligation is to apply the statute as Congress wrote it'"); see also *West Virginia University Hospitals, Inc.* v. *Casey*, 499 U.S. 83, 100-01, 111 S.Ct. 1138, 113 L.Ed.2d 68 (1991); *Union Bank* v. *Wolas*, 502 U.S. 151, 158, 162, 112 S.Ct. 527, 116 L.Ed.2d 514 (1991).

At trial, the district court instructed the jury that "[a]n employee has participated in protected activity if the employee has either complained to superiors regarding any issues related to the Fair Labor Standards Act or requested information from the government about minimum wages or overtime

compensation." We [would] hold that this instruction was incorrect under federal law.

The question of whether § 215(a)(3) covers informal complaints has never before been addressed by this court. See *Knickerbocker* v. *City of Stockton*, 81 F.3d 907, 912 n.3 (9th Cir.1996) (declining to decide whether internal complaints are protected conduct under the FLSA). However, this issue was recently considered by the Second Circuit, which held that "[t]he plain language of [section 215(a)(3)] limits the cause of action to retaliation for filing formal complaints, instituting a proceeding, or testifying, but does not encompass complaints made to a supervisor." See *Lambert* v. *Genesee Hospital*, 10 F.3d 46, 50, 55 (2d Cir.1993), cert. denied, 511 U.S. 1052, 114 S.Ct. 1612, 128 L.Ed.2d 339 (1994). Because we agree with the Genesee court that the language of the FLSA's anti-retaliation provision is plain and unambiguous, we [would] now adopt the Second Circuit's analysis.

In *Genesee*, certain female employees alleged that they were retaliated against in violation of the Equal Pay Act (EPA).[5] Specifically, the female employees claimed that the promotion of a male employee to manager was in retaliation for the female employees' complaints to their supervisors about the denial of equal pay and for other complaints of discrimination. *Id.* at 51. Because the *Genesee* plaintiffs' retaliation claims all arose out of informal, oral complaints to a supervisor, the Second Circuit held that the plaintiffs failed to state a cause of action under § 215(a)(3). *Genesee*, 10 F.3d at 54-56.

In reaching this conclusion, the court contrasted Title VII's broad anti-retaliation provision with the FLSA's

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[5] The EPA is an amendment to the FLSA and is codified under the same chapter. Therefore, retaliation for filing EPA complaints, like retaliation for filing overtime complaints, is analyzed under § 215(a)(3). See *Genesee*, 10 F.3d at 55.

narrower coverage. Under Title VII, it is an unlawful employment practice for an employer to discriminate against an employee "because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a) (emphasis added). The "opposition" language in Title VII's anti-retaliation provision clearly encompasses an employee's complaint to supervisors, regardless of whether the employee also files a formal charge with the Equal Employment Opportunity Commission. *Genesee*, 10 F.3d at 55 (citation omitted). No such broad language is found in the FLSA's anti-retaliation provision.

The Second Circuit also distinguished its earlier case of *Brock* v. *Casey Truck Sales, Inc.*, 839 F.2d 872 (2d Cir.1988). In *Casey*, a DOL investigator, acting on a worker's overtime complaint, found that the employer had not properly paid overtime and had falsified its records in an attempt to hide its wrongdoing. *Id.* at 874-75. After the employer eventually admitted the violations and agreed to pay overtime wages, the employer nonetheless asked the employees to return the back overtime wages. Those who refused were fired. Noting the connection between the earlier formal proceedings and the retaliatory conduct, the court stated that the protection against retaliation under the FLSA "would be worthless if an employee could be fired for declining to give up the benefits he is due under the Act." *Id.* at 879. Thus, it was clear in *Casey* that there had been a formal complaint made to the DOL by an employee, a formal investigation, and a finding of overtime violations.

Similarly, in *Brennan* v. *Maxey's Yamaha, Inc.*, 513 F.2d 179 (8th Cir.1975), a company was ordered to pay back wages after a DOL investigation disclosed minimum wage and maximum hour violations. The company later insisted that employees endorse back the back wage checks. An employee protested this as unlawful conduct on the company's part and

was fired. The court held that the employee's protest was an act protected from reprisals, finding that "[h]er discharge was a direct result of her insistence upon receiving retroactive benefits required under the Act." *Id.* at 181.

In contrast, in *Genesee*, the acts for which the employer allegedly retaliated did not in any way grow out of the formal filing of a complaint. *Genesee*, 10 F.3d at 55-56. Rather, there were "simply oral complaints to a supervisor that an employee was being paid less than the complainants thought she should have been." *Id.* at 56.

The present case is much more closely analogous to *Genesee* than to *Casey*. Here, neither Lambert nor any of the other plaintiffs actually "filed" a formal complaint or instituted or testified in an FLSA proceeding. Rather, *Lambert* merely complained about overtime to her supervisor and to other Full House employees; called the DOL for information, and informed her superiors that she had done so; had her lawyers send a letter to Barry Ackerly regarding the overtime issue; and had a complaint delivered to the Sonics. Because such conduct is not encompassed by the plain and unambiguous language of § 215(a)(3), the plaintiffs have failed to state a retaliation claim under the FLSA.

We recognize that several other circuits have come to the conclusion that informal complaints and requests for information from the DOL do constitute protected activities under § 215(a)(3). See *E.E.O.C.* v. *Romeo Community Schools*, 976 F.2d 985, 989 (6th Cir.1992) (holding that complaining to a school district of unlawful sex discrimination and expressing the belief that the law is being broken are sufficient to state a retaliation claim); *E.E.O.C.* v. *White & Son Enterprises*, 881 F.2d 1006, 1011 (11th Cir.1989) (holding that unofficial complaints to an employer about unequal pay constitute an assertion of rights protected under the statute); *Brock* v. *Richardson*, 812 F.2d 121, 124-25 (3d Cir.1987) (holding that retaliation based on employer's mere

belief that an employee filed a formal complaint is sufficient to bring employer's conduct under the FLSA); *Love* v. *RE/MAX of America, Inc.*, 738 F.2d 383, 387 (10th Cir.1984) (holding that it is the assertion of statutory rights, not the filing of a formal complaint, which triggers a retaliation claim); *Crowley* v. *Pace Suburban Bus Div.*, 938 F.2d 797, 798 (7th Cir.1991) (broadly construing the statute to protect against retaliation for an employee's assertion of rights under the FLSA); *Brennan*, 513 F.2d at 181. These circuits have reached this conclusion by extending the language of § 215(a)(3) beyond its plain meaning so as to "effectuate the broad remedial purposes of the FLSA." We [should], however, reject this approach in light of the clear language of the statute.

B. Washington Law Covers Informal Overtime Complaints

Regardless of their failure to state a valid retaliation claim under federal law, the plaintiffs have asserted in their complaint state law claims for violation of public policy. Washington law prohibits retaliation against an employee who "has made any complaint to [her] employer" or who "has caused to be instituted or is about to cause to be instituted any proceeding under or related to the [Washington wage and overtime laws]." Wash. Rev.Code § 49.46.100(2) (emphasis added).[6] Since there is no dispute that Lambert complained to

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[6] Wash. Rev.Code § 49.46.100(2) provides in full that

> Any employer who discharges or in any manner discriminates against any employee because such employee has made any complaint to his employer, to the director, or his authorized representative that he has not been paid wages in accordance with the provisions of this chapter, or that the employer has violated any provision of this chapter, or because such employee has caused to be instituted or is about to cause to be instituted any proceeding under or related to this chapter, or

her superiors about the lack of overtime pay, and threatened on several occasions to file suit, Lambert has stated a valid retaliation claim under Washington law.

C. All of the Plaintiffs Have Stated a Valid Cause of Action Under Washington Law

Defendants argue that because all of the plaintiffs other than *Lambert* predicate their retaliation claims on Lambert's overtime complaints, they are covered by neither § 215(a)(3) nor Washington law, both of which impose liability for the discharge of "such employee" as engaged in protected conduct.

According to defendants, if the court is to give the words "such employee" any meaning, those words must be held to confine liability to the discharge of the employee who herself was engaged in the protected conduct. We [would] hold, however, that sufficient evidence was presented in this case to support a retaliation claim on behalf of all of the plaintiffs. The AEs have clearly shown that they complained as a group about overtime violations, and that Lambert pursued her claim for the benefit of the entire group. For instance, in their original letter to the Sonics, Lambert's attorneys referenced both Lambert's overtime complaints and those of the other employees. Thus, the defendants were on notice, specifically and directly, that Lambert and the other employees were making demands for overtime compensation. Moreover, Lambert, as well as Sonics officials, testified at trial that Lambert and Viltz were acting as spokespersons for the whole group of AEs in negotiations over their compensation.

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because such employee has testified or is about to testify in any such proceeding shall be deemed in violation of this chapter and shall, upon conviction therefor, be guilty of a gross misdemeanor.

Because the evidence supports a finding that Lambert and Viltz were acting as representatives for the AEs in complaining about overtime compensation, all of the present plaintiffs were entitled to protection against retaliation under Washington law.

This case was tried under federal law with the assumption that Washington law also governed the plaintiffs' claims. Because the district court only considered the plaintiffs' claims under the FLSA when considering defendants' motion for judgment as a matter of law, we [would] now remand to the trial court to reconsider the defendants' motion for judgment as a matter of law by reassessing the jury's finding of liability, taking into account only Washington law. Specifically, the district court must decide under Washington law whether the plaintiffs met their burden of proof as to causation and retaliatory intent, and whether or not the Ackerlys can be considered "employers" subject to personal liability.

III. Damages

In light of the failure of plaintiffs' retaliation claims under § 215(a)(3), the parties' arguments as to the availability of punitive damages under the FLSA are moot.

There is no dispute that Washington law does not allow for punitive damages in wrongful termination cases, see *Dailey* v. *North Coast Life Ins. Co.*, 129 Wash.2d 572, 919 P.2d 589 (1996); therefore, the punitive damages award [should be] reversed.

Turning to the emotional distress damages, each plaintiff was awarded $75,000 by the jury for emotional distress. Defendants argue that this must have been the product of speculation because the different plaintiffs manifested different symptoms, some physical and some purely mental, and none of the plaintiffs provided any corroborating evidence. See *Brady* v. *Gebbie*, 859 F.2d 1543, 1558 (9th Cir.1988), cert. denied, 489 U.S. 1100, 109 S.Ct. 1577, 103 L.Ed.2d 943

(1989) (plaintiff presented psychiatric testimony of emotional distress and permanent psychological damage). Plaintiffs respond that the defendants mistreated all of the AEs in the same way, thereby justifying identical awards. The district court agreed with the plaintiffs, finding that "the jury must have concluded that the emotional harm to each plaintiff was roughly equal given their similar treatment by defendants."

A reviewing court must uphold the jury's finding of the amount of damages unless the amount is "'grossly excessive or monstrous,' clearly not supported by the evidence, or 'only based on speculation or guesswork.'" *Los Angeles Memorial Coliseum Comm'n* v. *NFL*, 791 F.2d 1356, 1360 (9th Cir.1986) (citations omitted).

We agree with defendants that $75,000 for emotional distress is grossly excessive given that the symptoms manifested by the plaintiffs were not particularly severe. See *Avitia* v. *Metropolitan Club of Chicago, Inc.*, 49 F.3d 1219, 1230 (7th Cir.1995) (finding unreasonable a $21,000 award for emotional distress in an FLSA retaliation case); see also *Hetzel* v. *County of Prince William*, 89 F.3d 169, 171 (4th Cir.1996), cert. denied, 519 U.S. 1028, 117 S.Ct. 584, 136 L.Ed.2d 514 (reversing a $500,000 award for emotional distress arising out of retaliation in violation of the First Amendment). Moreover, that plaintiffs were all awarded the same amount, despite the fact that their distress levels varied widely, suggests that the awards were the product of guesswork.

We therefore [would] reverse with respect to the emotional distress damages and remand for determination of a reasonable amount should the district court find the defendants liable on remand.

IV. Attorneys' Fees

Because the district court [should] be required on remand to redetermine the appropriate attorneys' fee awards in light of its decision as to liability, we express no opinion at this time on the attorneys' fee issues raised by the parties.

APPENDIX B

LAURA LAMBERT; ESTHER ACKLEY; STEVE BELLING; PAT COOKE; LETITIA SELK; CHUCK VILTZ,
Plaintiffs-Appellees-Cross-Appellants,

v.

Barry Ackerly, William Ackerly; Seattle SuperSonics Inc., a former Washington corporation; Full House Sports & Entertainment Inc., a Washington corporation; SSI Sports Inc., a Washington corporation,
Defendants-Appellants-Cross-Appellees.

Nos. 96-36017, 96-36266 and 96-36267.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Feb. 6, 1998.

Decided Oct. 1, 1998.

Andrew L. Frey, Mayer, Brown & Platt, Washington, DC, for defendants-appellants-cross-appellees.

Spencer Hall, Jr. and John W. Widell, Mundt, MacGregor, Happel, Falconer, Zulauf and Hall, Seattle, WA, for plaintiffs-appellees-cross-appellants.

Appeals from the United States District Court for the Western District of Washington; Barbara J. Rothstein, District Judge, Presiding. D.C. No. CV-95-00039-BJR.

Before: BRUNETTI, RYMER, and KLEINFELD, Circuit Judges.

BRUNETTI, Circuit Judge:

Defendants appeal a verdict in favor of plaintiffs on plaintiffs' claims that they were discharged by defendants in retaliation for complaining about overtime compensation, in violation of the federal Fair Labor Standards Act (FLSA),

29 U.S.C. § 215(a)(3), and in violation of the public policy of the state of Washington. Plaintiffs, six former ticket sales account executives for the Seattle SuperSonics professional basketball team, were awarded compensatory and punitive damages as a result of the jury's finding that defendants, the Seattle SuperSonics, Inc., Full House Sports & Entertainment Inc., and Barry and William Ackerly, unlawfully discharged plaintiffs in retaliation for their overtime complaints.

The district court denied defendants' motion for judgment as a matter of law, but remitted plaintiffs' punitive damages award. The district court also awarded plaintiffs attorneys' fees. The defendants now appeal both the denial of their motion for judgment as a matter of law and the attorneys' fee award. Plaintiffs cross-appeal with respect to the issue of attorneys' fees.

FACTS

Plaintiffs Esther Ackley, Steve Belling, Pat Cooke, Laura Lambert, Letitia Selk, and Chuck Viltz were all employed by Full House Sports & Entertainment, Inc. (Full House) as ticket sales account executives (AEs) for the Seattle SuperSonics, a team in the National Basketball Association. The corporate defendants are the Seattle SuperSonics, Inc. (the Sonics) (formerly known as SSI Sports, Inc.) and Full House.[1] The individual defendants are Barry Ackerly and his son William Ackerly, corporate officers and directors of the corporate defendants.

As AEs, plaintiffs solicited orders for Sonics season tickets, multi-game packages, and group sales. They also

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[1] At the time of their discharge, the plaintiffs were employed by Full House. Prior to the time Full House was organized to run the SuperSonics, the AEs were employed by the entity known as the Seattle SuperSonics, Inc. The two corporate entities were treated collectively at trial.

staffed a season ticket information booth at Sonics basketball games. Beginning in 1991, AEs were paid a base salary of $13,000, with most of their compensation based on commissions. Also in 1991, the Sonics began paying AEs a $2,000 allowance for overtime worked at basketball games and other events. Any employee who exhausted this overtime was required to stop working or to take compensatory time. The Sonics paid this $2000 allowance in semi-monthly installments of $166.67 during the basketball season, regardless of overtime actually worked. By December of the 1993-94 season, with Sonics tickets largely sold out, the AEs' workweek was cut back to 20 hours plus game nights, and the automatic overtime payments were discontinued.

In March 1994, John Dresel, Sonics Executive Vice President, authorized Laura Kussick, Sonics Senior Vice President of Sales, to restructure ticket sales operations. Kussick concluded that the AEs, who were earning $60,000-$90,000 per year, were overpaid. Thereafter, Kussick and Ticket Sales Director Bob Boustead discussed a plan to alter the AEs' compensation structure with plaintiffs Lambert and Viltz, who had been chosen by the AEs to represent the group in discussions with Sonics management about compensation. A new compensation system was put into effect in June 1994, and in August 1994, Boustead instituted a fixed 8:30 a.m. to 5:30 p.m. workday for the AEs.

Meanwhile, after realizing that she had not been paid the full $2000 in overtime compensation for the 1993-94 season, Lambert left a note with Sonics Controller Brian Dixon on May 2, 1994, requesting a meeting. Lambert also raised the overtime issue with Boustead that day. On May 4, 1994, Lambert phoned the U.S. Department of Labor (DOL) to ask for information regarding overtime laws. Following that phone conversation, Lambert again spoke with Boustead, who said that overtime compensation was a "dead issue."

At a May 16, 1994 ticket sales department meeting, the AEs complained about the lack of overtime compensation, and were told by Boustead that they would receive no overtime the following year. Lambert then called the DOL again and asked for documentation regarding overtime requirements. Lambert presented this information to Dixon and to Sonics Payroll Manager Eddie Roldan on May 20, 1994. Dixon allegedly told Lambert that he knew the Sonics were breaking the law, but that William Ackerly did not care, and would not pay overtime. According to Lambert, Dixon threatened to fire her if she continued to pursue the overtime issue.

On June 17, 1994, Lambert's attorneys sent Barry Ackerly a letter requesting that the Sonics compensate Lambert and the other employees for overtime, in accordance with Washington law. Then, on July 6, 1994, Lambert delivered, but did not file, a complaint for unpaid overtime on her own behalf, naming Barry and William Ackerly and the Sonics as liable parties. On October 6, 1994 the Sonics settled Lambert's claim in exchange for a full release. At the same time, the Sonics paid other employees, including several of the present plaintiffs, amounts due them for overtime.

Less than a week after settling the overtime claims, on October 12, 1994, Dresel wrote a memo to William Ackerly informing Ackerly that, in anticipation of a mid-season decline in AE work, Dresel was planning to layoff the entire ticketing staff by November 30, 1994. Near the end of October 1994, the Sonics required each AE except Lambert to sign a memorandum stating that he or she had been paid overtime compensation for October 1992 through October 1994, and that he or she was not owed any further compensation.

On October 17, 1994 Full House was organized to run the Sonics business organization, and Dresel was named as President. Full House executives decided to restructure the ticket sales staff and to implement a "fluctuating workweek," whereby anyone working more than eight hours in one day

had to take corresponding compensatory time that week. Under this plan, only Dresel could authorize overtime.

During the 1994-95 season, the Sonics played in the Tacoma Dome while a new Key Arena was being built in Seattle. According to defendants, ticket demand was much smaller in Tacoma, and Kussick determined that the Tacoma Dome's group sales staff, which had ties to Tacoma companies, could better manage group sales. Thus, on December 2, 1994, Dresel held a meeting with the AEs at which he discharged nine of the ten employees on the Sonics ticket sales staff, including the six present plaintiffs. Three days prior to the announcement of the layoffs, Sonics management held a meeting with their public relations director and developed a strategy memorandum for explaining the impending layoffs.

Full House offered the discharged AEs severance packages, available only to those employees who signed a release of all claims and who agreed not to reapply for new AE positions after the restructuring of the ticket sales staff. The AEs all declined the package, but none applied for the restructured positions that Full House began to fill in March 1995. Rather, the AEs filed the present suit in state court. Thereafter, the case was removed to federal district court by the defendants.

A three-week jury trial was held before the district court on plaintiffs' claims that they were discharged by defendants in retaliation for complaining about the lack of overtime compensation, in violation of the FLSA, 29 U.S.C. § 215(a)(3), and in violation of the public policy of the state of Washington, as embodied in Wash. Rev. Code § 49.46.100(2). Prior to trial, defendants conceded that certain of their overtime practices were in violation of applicable laws, and the district court granted partial summary judgment as to this issue.

The trial resulted in a general jury verdict for plaintiffs in the amount of combined wage losses of $697,000, emotional distress damages totaling $450,000, and a total of $12 million in punitive damages ($5 million against the corporate defendants, $4 million against Barry Ackerly, and $3 million against William Ackerly).

After trial, defendants moved for judgment as a matter of law, or in the alternative, for a new trial and/or remittitur. On August 12, 1996, the district court entered an order denying the motion for judgment as a matter of law, but finding that the punitive damages verdict was excessive, and therefore remitting it to $1,394,000 per defendant, for a total of $4,182,000 in punitive damages. In addition, the district court awarded plaintiffs attorneys' fees in the amount of $389,117.50. On October 24, 1996, the district court awarded plaintiffs supplemental attorneys' fees in connection with the post-trial motion in the amount of $44,075.

DISCUSSION

I.

Standard of Review

This court reviews the district court's grant or denial of a renewed motion for judgment as a matter of law de novo. *E.E.O.C.* v. *Pape Lift Inc.*, 115 F.3d 676, 680 (9th Cir.1997); *Forrett* v. *Richardson*, 112 F.3d 416, 419 (9th Cir.1997). The reviewing court's role is the same as that of the district court. *Forrett*, 112 F.3d at 419. Judgment as a matter of law is proper if the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, and that conclusion is contrary to the jury's. *Id.* (citation omitted).

II.

Liability

The plaintiffs alleged that they were retaliated against in violation of both the federal FLSA and the public policy of the state of Washington. We now hold that the plaintiffs failed to state a valid claim under federal law, but were properly allowed to proceed with their claims under Washington law.

A. Retaliation for Informal Complaints Is Not Covered Under the FLSA

The FLSA's anti-retaliation provision makes it unlawful "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee." 29 U.S.C. § 215(a)(3). Defendants urge us to strictly construe this provision, so as to exclude the present plaintiffs' informal complaints from its coverage.

"As in all cases of statutory interpretation, our starting point in determining Congress's intent must be the language of the statute itself." *Fernandez* v. *Brock*, 840 F.2d 622, 632 (9th Cir.1988); *Dunn* v. *CFTC*, 519 U.S. 465, 117 S.Ct. 913, 916, 137 L.Ed.2d 93 (1997) ("[A]bsent any 'indication that doing so would frustrate Congress's clear intention or yield patent absurdity, our obligation is to apply the statute as Congress wrote it'"); see also *West Virginia University Hospitals, Inc.* v. *Casey*, 499 U.S. 83, 100-01, 111 S.Ct. 1138, 113 L.Ed.2d 68 (1991); *Union Bank* v. *Wolas*, 502 U.S. 151, 158, 162, 112 S.Ct. 527, 116 L.Ed.2d 514 (1991).

At trial, the district court instructed the jury that "[a]n employee has participated in protected activity if the employee has either complained to superiors regarding any issues related to the Fair Labor Standards Act or requested information from

the government about minimum wages or overtime compensation." We hold that this instruction was incorrect under federal law.

The question of whether § 215(a)(3) covers informal complaints has never before been addressed by this court. See *Knickerbocker* v. *City of Stockton*, 81 F.3d 907, 912 n. 3 (9th Cir.1996) (declining to decide whether internal complaints are protected conduct under the FLSA). However, this issue was recently considered by the Second Circuit, which held that "[t]he plain language of [section 215(a)(3)] limits the cause of action to retaliation for filing formal complaints, instituting a proceeding, or testifying, but does not encompass complaints made to a supervisor." See *Lambert* v. *Genesee Hospital*, 10 F.3d 46, 50, 55 (2d Cir.1993), *cert. denied*, 511 U.S. 1052, 114 S.Ct. 1612, 128 L.Ed.2d 339 (1994). Because we agree with the Genesee court that the language of the FLSA's anti-retaliation provision is plain and unambiguous, we now adopt the Second Circuit's analysis.

In Genesee, certain female employees alleged that they were retaliated against in violation of the Equal Pay Act (EPA).[2] Specifically, the female employees claimed that the promotion of a male employee to manager was in retaliation for the female employees' complaints to their supervisors about the denial of equal pay and for other complaints of discrimination. *Id.* at 51. Because the Genesee plaintiffs' retaliation claims all arose out of informal, oral complaints to a supervisor, the Second Circuit held that the plaintiffs failed to state a cause of action under § 215(a)(3). *Genesee*, 10 F.3d at 54-56.

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[2] The EPA is an amendment to the FLSA and is codified under the same chapter. Therefore, retaliation for filing EPA complaints, like retaliation for filing overtime complaints, is analyzed under § 215(a)(3). See *Genesee*, 10 F.3d at 55.

In reaching this conclusion, the court contrasted Title VII's broad anti-retaliation provision with the FLSA's narrower coverage. Under Title VII, it is an unlawful employment practice for an employer to discriminate against an employee "because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a) (emphasis added). The "opposition" language in Title VII's anti- retaliation provision clearly encompasses an employee's complaint to supervisors, regardless of whether the employee also files a formal charge with the Equal Employment Opportunity Commission. *Genesee*, 10 F.3d at 55 (citation omitted). No such broad language is found in the FLSA's anti-retaliation provision.

The Second Circuit also distinguished its earlier case of *Brock* v. *Casey Truck Sales, Inc.*, 839 F.2d 872 (2d Cir.1988). In Casey, a DOL investigator, acting on a worker's overtime complaint, found that the employer had not properly paid overtime and had falsified its records in an attempt to hide its wrongdoing. *Id.* at 874-75. After the employer eventually admitted the violations and agreed to pay overtime wages, the employer nonetheless asked the employees to return the back overtime wages. Those who refused were fired. Noting the connection between the earlier formal proceedings and the retaliatory conduct, the court stated that the protection against retaliation under the FLSA "would be worthless if an employee could be fired for declining to give up the benefits he is due under the Act." *Id.* at 879. Thus, it was clear in Casey that there had been a formal complaint made to the DOL by an employee, a formal investigation, and a finding of overtime violations.

Similarly, in *Brennan* v. *Maxey's Yamaha, Inc.*, 513 F.2d 179 (8th Cir.1975), a company was ordered to pay back wages after a DOL investigation disclosed minimum wage and maximum hour violations. The company later insisted that

employees endorse back the back wage checks. An employee protested this as unlawful conduct on the company's part and was fired. The court held that the employee's protest was an act protected from reprisals, finding that "[h]er discharge was a direct result of her insistence upon receiving retroactive benefits required under the Act." *Id.* at 181.

In contrast, in *Genesee*, the acts for which the employer allegedly retaliated did not in any way grow out of the formal filing of a complaint. *Genesee*, 10 F.3d at 55-56. Rather, there were "simply oral complaints to a supervisor that an employee was being paid less than the complainants thought she should have been." *Id.* at 56.

The present case is much more closely analogous to *Genesee* than to *Casey*. Here, neither Lambert nor any of the other plaintiffs actually "filed" a formal complaint or instituted or testified in an FLSA proceeding. Rather, Lambert merely complained about overtime to her supervisor and to other Full House employees; called the DOL for information, and informed her superiors that she had done so; had her lawyers send a letter to Barry Ackerly regarding the overtime issue; and had a complaint delivered to the Sonics. Because such conduct is not encompassed by the plain and unambiguous language of § 215(a)(3), the plaintiffs have failed to state a retaliation claim under the FLSA.

We recognize that several other circuits have come to the conclusion that informal complaints and requests for information from the DOL do constitute protected activities under § 215(a)(3). See *E.E.O.C.* v. *Romeo Community Schools*, 976 F.2d 985, 989 (6th Cir.1992) (holding that complaining to a school district of unlawful sex discrimination and expressing the belief that the law is being broken are sufficient to state a retaliation claim); *E.E.O.C.* v. *White & Son Enterprises*, 881 F.2d 1006, 1011 (11th Cir.1989) (holding that unofficial complaints to an employer about unequal pay constitute an assertion of rights protected under

the statute); *Brock* v. *Richardson*, 812 F.2d 121, 124-25 (3d Cir.1987) (holding that retaliation based on employer's mere belief that an employee filed a formal complaint is sufficient to bring employer's conduct under the FLSA); *Love* v. *RE/MAX of America, Inc.*, 738 F.2d 383, 387 (10th Cir.1984) (holding that it is the assertion of statutory rights, not the filing of a formal complaint, which triggers a retaliation claim); *Crowley* v. *Pace Suburban Business Div.*, 938 F.2d 797, 798 (7th Cir.1991) (broadly construing the statute to protect against retaliation for an employee's assertion of rights under the FLSA); *Brennan*, 513 F.2d at 181. These circuits have reached this conclusion by extending the language of § 215(a)(3) beyond its plain meaning so as to "effectuate the broad remedial purposes of the FLSA." We, however, reject this approach in light of the clear language of the statute.

B. Washington Law Covers Informal Overtime Complaints

Regardless of their failure to state a valid retaliation claim under federal law, the plaintiffs have asserted in their complaint state law claims for violation of public policy. Washington law prohibits retaliation against an employee who "has made any complaint to [her] employer" or who "has caused to be instituted or is about to cause to be instituted any proceeding under or related to the [Washington wage and overtime laws]." Wash. Rev.Code § 49.46.100(2) (emphasis added).[3] Since there is no dispute that Lambert complained to

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[3] Wash. Rev. Code § 49.46.100(2) provides in full that

> Any employer who discharges or in any manner discriminates against any employee because such employee has made any complaint to his employer, to the director, or his authorized representative that he has not been paid wages in accordance with the provisions of this chapter, or that the employer has violated any provision of this chapter, or because such employee has caused to be instituted or is about to cause to be

her superiors about the lack of overtime pay, and threatened on several occasions to file suit, Lambert has stated a valid retaliation claim under Washington law.

C. All of the Plaintiffs Have Stated a Valid Cause of Action Under Washington Law

Defendants argue that because all of the plaintiffs other than Lambert predicate their retaliation claims on Lambert's overtime complaints, they are covered by neither § 215(a)(3) nor Washington law, both of which impose liability for the discharge of "such employee" as engaged in protected conduct.

According to defendants, if the court is to give the words "such employee" any meaning, those words must be held to confine liability to the discharge of the employee who herself was engaged in the protected conduct. We hold, however, that sufficient evidence was presented in this case to support a retaliation claim on behalf of all of the plaintiffs. The AEs have clearly shown that they complained as a group about overtime violations, and that Lambert pursued her claim for the benefit of the entire group. For instance, in their original letter to the Sonics, Lambert's attorneys referenced both Lambert's overtime complaints and those of the other employees. Thus, the defendants were on notice, specifically and directly, that Lambert and the other employees were making demands for overtime compensation. Moreover, Lambert, as well as Sonics officials, testified at trial that Lambert and Viltz were acting as spokespersons for the whole group of AEs in negotiations over their compensation.

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instituted any proceeding under or related to this chapter, or because such employee has testified or is about to testify in any such proceeding shall be deemed in violation of this chapter and shall, upon conviction therefor, be guilty of a gross misdemeanor.

Because the evidence supports a finding that Lambert and Viltz were acting as representatives for the AEs in complaining about overtime compensation, all of the present plaintiffs were entitled to protection against retaliation under Washington law.

This case was tried under federal law with the assumption that Washington law also governed the plaintiffs' claims. Because the district court only considered the plaintiffs' claims under the FLSA when considering defendants' motion for judgment as a matter of law, we now remand to the trial court to reconsider the defendants' motion for judgment as a matter of law by reassessing the jury's finding of liability, taking into account only Washington law. Specifically, the district court must decide under Washington law whether the plaintiffs met their burden of proof as to causation and retaliatory intent, and whether or not the Ackerlys can be considered "employers" subject to personal liability.

III.

Damages

In light of the failure of plaintiffs' retaliation claims under § 215(a)(3), the parties' arguments as to the availability of punitive damages under the FLSA are moot.

There is no dispute that Washington law does not allow for punitive damages in wrongful termination cases, see *Dailey* v. *North Coast Life Ins. Co.*, 129 Wash.2d 572, 919 P.2d 589 (1996); therefore, the punitive damages award is reversed.

Turning to the emotional distress damages, each plaintiff was awarded $75,000 by the jury for emotional distress. Defendants argue that this must have been the product of speculation because the different plaintiffs manifested different symptoms, some physical and some purely mental, and none of the plaintiffs provided any corroborating evidence. See *Brady* v. *Gebbie*, 859 F.2d 1543, 1558 (9th Cir.1988), *cert.*

denied, 489 U.S. 1100, 109 S.Ct. 1577, 103 L.Ed.2d 943 (1989) (plaintiff presented psychiatric testimony of emotional distress and permanent psychological damage). Plaintiffs respond that the defendants mistreated all of the AEs in the same way, thereby justifying identical awards. The district court agreed with the plaintiffs, finding that "the jury must have concluded that the emotional harm to each plaintiff was roughly equal given their similar treatment by defendants."

A reviewing court must uphold the jury's finding of the amount of damages unless the amount is "'grossly excessive or monstrous,' clearly not supported by the evidence, or 'only based on speculation or guesswork.'" *Los Angeles Memorial Coliseum Comm'n* v. *NFL*, 791 F.2d 1356, 1360 (9th Cir.1986) (citations omitted).

We agree with defendants that $75,000 for emotional distress is grossly excessive given that the symptoms manifested by the plaintiffs were not particularly severe. See *Avitia* v. *Metropolitan Club of Chicago, Inc.*, 49 F.3d 1219, 1230 (7th Cir.1995) (finding unreasonable a $21,000 award for emotional distress in an FLSA retaliation case); see also *Hetzel* v. *County of Prince William*, 89 F.3d 169, 171 (4th Cir.1996), *cert. denied*, 519 U.S. 1028, 117 S.Ct. 584, 136 L.Ed.2d 514 (reversing a $500,000 award for emotional distress arising out of retaliation in violation of the First Amendment). Moreover, that plaintiffs were all awarded the same amount, despite the fact that their distress levels varied widely, suggests that the awards were the product of guesswork.

We therefore reverse with respect to the emotional distress damages and remand for determination of a reasonable amount should the district court find the defendants liable on remand.

IV.

Attorneys' Fees

Because the district court will be required on remand to redetermine the appropriate attorneys' fee awards in light of its decision as to liability, we express no opinion at this time on the attorneys' fee issues raised by the parties.

CONCLUSION

In sum, we hold that the FLSA only prohibits retaliation for that conduct specifically enumerated in 29 U.S.C. § 215(a)(3). Washington law, on the other hand, protects against retaliation for any overtime complaint, including an informal complaint to a supervisor. Accordingly, we remand to the district court to reconsider defendants' motion for judgment as a matter of law.

AFFIRMED in part, REVERSED in part, and REMANDED.

APPENDIX C

NO. C-95-39r

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LAURA A. LAMBERT, ESTHER ACKLEY, STEVE BELLING, PAT COOKE, LETITIA SELK, AND CHUCK VILTZ,
Plaintiffs

v.

BARRY ACKERLEY; WILLIAM ACKERLEY; SEATTLE SUPERSONICS, INC., a former Washington corporation; SSI SPORTS, INC., a Washington corporation, and FULL HOUSE SPORTS & ENTERTAINMENT, INC., a Washington Corporation,
Defendants.

ORDER DENYING DEFENDANTS' MOTION FOR JUDGEMENT AS A MATTER OF LAW AND GRANTING DEFENDANTS' MOTION FOR REMITTITUR

THIS MATTER comes before the court on motions by defendants for judgment as a matter of law, or for a new trial or remittitur. Having considered the documents filed in support of and in opposition to the motions, the court finds and rules as follows:

I. Background

Plaintiffs Esther Ackley, Steve Belling, Pat Cooke, Laura Lambert, Letitia Selk, and Chuck Viltz were formerly employed by defendant Full House Sports & Entertainment, Inc. as ticket sales agents for the Seattle SuperSonics, a professional basketball team. Defendants are Barry Ackerley, William Ackerley, the Seattle SuperSonics, Inc., SSI Sports, Inc., and Full House Sports & Entertainment, Inc.[1] The six plaintiffs claimed they were discharged by defendants in retaliation for activities protected under the Fair Labor Standards Act ("the FLSA"), 29 U.S.C. §215(a)(3), and in violation of the public policy of Washington expressed in RCW 49.46.100(2). A lengthy jury trial was held on plaintiffs' claims, resulting in a verdict on February 29, 1996. The jury found in favor of plaintiffs, awarding damages for wage losses totaling $697,000 (for the six plaintiffs combined); emotional distress damages totaling $450,000; and a total of $12 million in punitive damages. The jury allocated punitive damages among the defendants as follows: $5 million against the Corporate defendants; $4 million against Barry Ackerley; and $3 million against William Ackerley.

Defendants have moved for judgement as a matter of law, or in the alternative, for a new trial and/or remittitur. The corporate defendants have raised the following arguments: plaintiffs did not prove they had engaged in, or were discharged in retaliation for, conduct protected under the FLSA; punitive damages are not available under the FLSA or Washington law; there was insufficient evidence of malice or

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[1] Hereinafter, the court will refer to the corporate entities jointly as "the Corporate defendants." The parties stipulated that Barry Ackerley and William Ackerley were, during the relevant period of time, officers and directors of Seattle Supersonics, Inc. or SSI Sports, Inc. and directors of Full House Sports & Entertainment, Inc.

recklessness to support an award of punitive damages; the punitive damages awarded were excessive; the compensatory damages were unreasonable; the wage loss damages awarded plaintiff Pat Cooke were inappropriate; and two of the three corporate defendants should be dismissed as a matter of law.

Barry Ackerley has joined the arguments made by the Corporate defendants, and also argues there was insufficient evidence to hold him liable for retaliatory discharge. He also argues that the punitive damages award was inappropriate as to him because there was insufficient evidence of malice or recklessness by him personally, and that the punitive damages award was excessive. William Ackerley has asserted the same arguments made by Barry Ackerley and the Corporate defendants, and also argues that his personal wealth is such that the punitive damages award is grossly excessive.

II. Protected Activity

All defendants argue that plaintiffs did not engage in conduct protected by the FLSA, and therefore cannot recover under that statute. The FSLA prohibits the discharge of "any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter." 29 U.S.C. § 215(a)(3). In this case, the plaintiffs did not file formal complaints with any government agency. However, Section 215(a)(3) has been liberally interpreted. Informal complaints and requests for information from the government have been deemed "protected" activity. *See E.E.O.C.* v. *Romeo Community Schools*, 976 F.2d 985, 989 (6th Cir. 1992) ("the [FLSA] also applies to the unofficial assertion [of] rights through complaints at work . . . . [I]t is the assertion of rights which is the triggering factor, not the filing of a formal complaint.") (citations omitted); *E.E.O.C.* v. *White & Son Enterprises*, 881 F.2d 1006, 1011 (11th Cir. 1989) ("The unofficial complaints expressed by the women to their employer about unequal pay constitute an assertion of rights under the [FLSA]"); *Brock* v.

Richardson, 812 F.2d 121, 124-25 (3d Cir. 1987) ("[T]he discharge of an employee in the mistaken belief that the employee has engaged in protected activity creates the same atmosphere of intimidation as does the discharge of an employee who did in fact complain of FLSA violations. For that reason, . . . a finding that an employer retaliated against an employee because the employer believed the employee complained. . . is sufficient to bring the employer's conduct within" Section 15(a)(3)); *Love* v. *RE/MAX of America, Inc.*, 738 F.2d 383, 387 (10th Cir. 1984); *Brennan* v. *Maxey's Yamaha, Inc.*, 513 F.2d 179, 181 (8th Cir. 1975); *Cuevas* v. *Monroe Street City Club, Inc.*, 752 F. Supp. 1405, 1413 (N.D.Ill. 1990); *Prewitt* v. *Factory Motor Parts, Inc.*, 747 F.Supp. 560, 562-64 (W.D.Mo. 1990); *Daniel V. Winn-Dixie Atlanta, Inc.*, 611 F.Supp. 57 (N.D.Ga. 1985); *Crowley* v. *Pace Suburban Bus Div. of Regional Transp. Authority*, 938 F.2d 797, 798 n.3 (7th Cir. 1991) (noting that § 215(a)(3) has been "construed broadly"); *but see Lambert* v. *Genesee Hosp.*, 10 F.3d 46, 55 (2nd Cir. 1993) (FLSA "does not encompass complaints made to a supervisor"). Additionally, in *Knickerbocker* v. *City of Stockton*, 81 F.3d 907 (9th Cir. 1996), the Ninth Circuit Court of Appeals referred to Knickerbocker's informal complaints to a supervisor regarding an overtime issue as "protected activity" but found it unnecessary to rule on that issue. *Id.* at 911 & n. 3.

The court finds that, based on the evidence presented by plaintiffs concerning their activities, their acts rise to the level of protected activities under the FLSA. These activities include the following: complaints to managers by plaintiffs concerning defendants' overtime policies; contact with the Department of Labor; complaints to the Vice President of Finance; hiring an attorney to look into the issue; and delivery to Barry Ackerley of a complaint regarding this issue.

Plaintiff Laura Lambert spearheaded much of the complaining done by plaintiffs, but as John Dresel testified at trial, in his mind "the whole group [was] lumped together" at

the time plaintiffs were fired. In addition to finding that plaintiffs together participated in protected activity, the court finds that the overwhelming evidence at trial was that plaintiffs were treated as a group by defendants. The evidence also demonstrated that Lambert's complaints were voiced on behalf of the group of plaintiffs, and that defendants perceived the complaints to be on behalf of the group as a whole. Defendants negotiated with and treated Lambert as a representative and leader of the group of plaintiffs. Plaintiffs' theory of their case was that the entire group of ticket sales agents was terminated because defendants did not want to pay them overtime and the ticket sales staff had begun to complain about this. The jury apparently believed plaintiffs' version of the facts, and based on the evidence presented, the court cannot find that this was an unreasonable inference for the jury to draw.

Based upon the policy behind § 215 (a)(3) and the evidence at trial, the court finds, on the facts of this case, plaintiffs' actions constituted activities "protected" by the FLSA.

III. Retaliation

All defendants argue that plaintiffs did not present sufficient evidence that they were fired as a result of any retaliatory motive by defendants and that the instructions to the jury on this issue were erroneous.

A. Retaliatory Discharge

Defendants contend the jury was inappropriately instructed that liability was allowable if the jury found that "protected activity was a substantial motivating factor" in the adverse employment actions taken against each plaintiff.[2]

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[2] The jury was instructed that to prevail on their retaliation claim, each plaintiff must show the following:

Prior to instructing the jury, the court found, and repeats its finding here, that there was sufficient evidence of retaliation to warrant the "dual motive" or "mixed motive" instruction given. Defendants previously argued, and apparently repeat the argument here, that plaintiffs "put on a single motive case." *See* Defs' Proposed Instruction No. 20, Remarks at Top of Instr. Defendants proposed instead a "single-motive test" instruction which included the language that "in order [for the jury] to find for plaintiff, [the jury] must find from all of the evidence that the plaintiff has proved by a preponderance of the evidence that plaintiff was discharged solely because of that plaintiff's questions or complaints . . ." Defs' Proposed Instruction No. 19. As plaintiffs had not put on a single-motive case, the court properly rejected this instruction.

Defendants also challenge the language of the dual motive instruction given because it lacked "but for" causation language. The court finds that the instruction given, despite its failure to include "but for" language, conveyed the necessary requirements to the jury by requiring that it find that plaintiffs had proven that "protected activity was a substantial motivating factor" in the adverse employment actions taken against each plaintiff.

> 1. That the defendant was aware of one or more plaintiffs' participation in protected activity;
>
> 2. That an adverse employment action was taken against the plaintiff;
>
> 3. That the protected activity was a substantial motivating factor in the adverse employment action as to that plaintiff.

Instruction No. 14.

The jury was also instructed that plaintiffs had the burden of proof on their claims. *See* Instruction No. 7.

Since the conclusion of the trial in this matter, the Ninth Circuit Court of Appeals in *Knickerbocker* v. *City of Stockton*, 81 F.3d 907 (9th Cir. 1996), has reaffirmed that "[u]nder the dual motive test, a plaintiff must show that her protected activities were a 'substantial factor' in the complained of adverse employment action." *Id.* at 911. The court's instruction included this language. The *Knickerbocker* court also stated that protected activities "are a 'substantial factor' where the adverse actions would not have been taken 'but for' the protected activities." *Id.* The court finds that although this definition of "substantial factor" would have further refined the jury instruction, the instruction given sufficiently conveyed the standard which plaintiffs were required to meet in order to prevail.

All defendants argue that there was insufficient evidence of retaliatory intent or motivation and therefore they cannot be held liable under § 215(a)(3). As noted above, the jury was instructed that the protected activity must have been a "substantial motivating factor" in the adverse employment actions taken against each plaintiff. The court finds that the evidence introduced at trial more than satisfied the requirement that retaliatory intent be shown. Additionally, the court notes that there was substantial evidence at trial that "the adverse actions would not have been taken 'but for' the protected activities." Even without the challenged statement made by Brian Dixon, the court finds that the evidence of intent was sufficient to support the jury's verdict, as against the Corporate defendants, as well as the two individual defendants.[3]

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[3] The court notes that Barry and William Ackerley failed to request an instruction limiting the admissibility of Dixon's statements to the Corporate defendants.

B. Barry and William Ackerley as "Employers"

Barry and William Ackerley assert for the first time in their post-trial Motion for Judgment as a Matter of Law that the *court* should have determined whether the individual defendants qualified as "employers" under § 215(a)(3) of the FLSA. Defendants did not object to the jury instructions on this basis. Accordingly, the jury was instructed on the standard that must be met to qualify as an employer under the FLSA, and subsequently determined that Barry and William Ackerley were employers. Whether a person is an employer depends on the "circumstances of the whole activity," *Bonnette* v. *California Health & Welfare Agency*, 704 F.2d 1465, 1469 (9th Cir. 1983). The court has reviewed the evidence and arguments on this issue and independently finds that Barry and William had "operational control," had "economic control over the relationship" with plaintiffs, *id.* at 1470, and were employers as that term is used in the FLSA. Therefore, the jury and the court reached the same conclusion on this issue.

IV. Punitive Damages

A. Availability of Punitive Damages

All defendants argue that punitive damages are not available under the FLSA or Washington law, and therefore move to have that portion of the jury's verdict set aside.

1. Argument Raised for the First Time Post-Trial

In their post-trial motions for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b) all defendants for the first time raise the issue of whether punitive damages are available under the FLSA. Defendants argue that such damages are not recoverable under the FLSA, and thus that portion of the jury's verdict must be vacated.

"Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such

a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment." Fed. R. Civ. P. 50(a)(2). In making a motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b), defendants are permitted to "renew [a] request for judgment as a matter of law." Because the court instructed the jury on punitive damages, it is possible that defendants' motion is brought pursuant to Fed. R. Civ. P. 51 which states that "[n]o party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." Defendants did not raise the issue of the availability of punitive damages in a motion to strike the claim for punitive damages from plaintiffs' complaint, nor did defendants move for partial summary judgment or file a motion *in limine* on this issue. Indeed, defendants' February 20, 1996 Motion for Judgment as a Matter of Law on Certain Claims, filed after the close of plaintiffs' case in chief, did not question the availability of punitive damages. Lastly, defendants did not object to the jury instructions on this basis.

During discussions of jury instructions, defendants contended there was insufficient evidence of malice or recklessness to warrant sending the issue of punitive damages to the jury, but never argued the *unavailability* of such damages under the FLSA as a matter of law. In fact, the court was surprised by the fact that defendants' post-trial brief contained this argument, having never previously heard it from defendants in this case. The court notes that defendants' 69-page trial brief, filed two weeks before trial was scheduled to begin[4], did include the following three sentences: "Some plaintiffs also seek punitive damages for retaliation under the FLSA. However, such damages should not be allowed. If

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[4] Trial was scheduled to commence on February 5, 1996 but actually began two days later on February 7, 1996.

they are allowed, they should be limited to circumstances in which the liquidated damages test is met." Defs' Jan. 22, 1996 Trial Brief, pp. 39-40.

Defendants claim they have not waived the argument about whether punitive damages are available under the FLSA because it was raised in their trial brief, as noted above. Additionally, defendants claim (through new counsel, retained after the conclusion of the trial) that the statement at the top of Defendants' Proposed Jury Instruction No. 27 on punitive damages, indicating that defendants did "not believe that this instruction is necessary," preserved their argument. The court finds, and defendants' counsel did not dispute at oral argument, that the language at the top of Defendants' Proposed Jury Instruction No. 27 did not raise this issue at all. Instead, defendants were disputing whether or not plaintiffs had made the requisite showing (in their pretrial submissions and at trial) to allege a case of retaliation, or of malice and/or recklessness by defendants. The court is certain the discussions with the court and opposing counsel in chambers did not ever concern whether or not punitive damages were an available remedy under the FLSA.

Defendants cite *Los Angeles Land Co.* v. *Brunswick Corp.*, 6 F.3d 1422 (9th Cir. 1993), for the proposition that the court should apply "the law truly controlling the case, regardless of the jury instructions." *Id.* at n. 2, 1426. Thus, defendants argue the court should entertain their motion for judgment as a matter of law concerning the availability of punitive damages under the FLSA. However, *Los Angeles Land Co.*, and the case it relied upon, *Air-Sea Forwarders, Inc.* v. *Air Asia Co., Ltd.*, 880 F.2d 176, 182-83 & n. 5 (9th Cir. 1989), *cert. denied*, 493 U.S. 1058 (1990), both concerned the no doubt more common situation in which the party moving for judgment as a matter of law *had* made a

motion for a directed verdict[5] relating to the disputed issue at the close of the evidence. *See Los Angeles Land Co.*, 6F.3d at 1425 & n. 1 (motion for directed verdict as well as motion for judgment notwithstanding the verdict made); *Air-Sea Forwarders, Inc.*, 880 F.2d at 183 & n. 9. Additionally, *Air-Sea Forwarders, Inc.* relied upon *City of St. Louis* v. *Praprotnik*, 485 U.S. 112 (1988), which made clear that, in that appeal, "the focus of petitioner's challenge [was] not on the jury instruction itself, but on the denial of its motions for summary judgment and a directed verdict." *Id.* at 120.

In *Bertrand* v. *Southern Pacific Company*, 282 F.2d 569 (9th Cir. 1960), the Ninth Circuit Court of Appeals discussed a similar situation as follows:

> After all of the instructions were given, appellant was afforded an opportunity to object, out of the hearing of the jury, to the instructions given and refused. No objection was made at that time to the instruction referred to above . . . .
>
> Appellant . . . draws attention to a trial memorandum which he had submitted to the court at the outset of the trial. In this memorandum certain cases are cited which, appellant argues, established the incorrectness of the instruction now under attack . . .
>
> The trial court is not required to rummage through trial briefs and proposed instructions in an effort to discover potential objections to instructions not yet given or formulated. Rule 51 provides the procedures to be followed. The procedures are not mere technicalities. Rule 51 is designed to bring possible errors to light while there is still time to correct them without entailing the

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[5] Directed verdict motions and motions for judgment notwithstanding the verdict are now referred to as motions for judgment as a matter of law. *See* Fed. R. Civ. P. 50, 1991 Amendment.

> cost, delay and expenditure of judicial resources occasioned by retrials.
>
> . . . whatever the form of the objection [to the jury instruction] it must at least state distinctly the matter to which objection is taken and the grounds for the objection. As indicated above the remarks in chambers, notations in the trial memorandum, and proposed instructions failed in both of these particulars.

Id. at 571-72.

Here, the court was far from "fully aware" of the defendants' position with respect to punitive damages, *see Glover* v. *BIC Corp.*, 6 F.3d 1318, 1326 (9th Cir. 1993). Instead, the issue was raised for the first time in the post-trial Motion for Judgment as a Matter of Law. There was no summary judgment motion or motion *in limine* filed on the issue and no mention of it was made during trial, or during the lengthy in-chambers discussions with the court concerning jury instructions. Additionally, defendants' Motion for Judgment as a Matter of Law made during trial did not mention this issue. The court finds that defendants waived the issue of the availability of punitive damages by failing to properly raise the issue before the close of trial.[6]

2. Availability of Punitive Damages under the FLSA

Even if defendants had not waived the issue of the availability of punitive damages, the court would follow the sole Court of Appeals decision on point and find in favor of

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[6] At oral argument, the possibility was raised that defendants may have intentionally decided not to bring this issue to the court's attention prior to or during trial. Because the court does not feel it would be appropriate to inquire into defendants' trial strategy, it will not speculate on this possibility. Of course, if defendants intentionally did not raise the issue, it would certainly be too late to do so post-trial.

plaintiffs on this issue. In arguing that punitive damages are not available as a remedy for retaliation in violation of the FLSA, defendants rely on the interpretation given similar language in the Age Discrimination in Employment Act ("the ADEA"). The 1977 amendment to the FLSA added the following language to the FLSA:

> Any employer who violates the provisions of section 15(a)(3) of this Act shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 15(a)(3), including *without limitation* employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages.

Pub. L. No. 95-151, § 10(a), 91 Stat. 1252 (emphasis added).

The Seventh Circuit is the only Court of Appeals thus far to have ruled on the issue of the availability of punitive damages under the retaliation provision of the FLSA. In *Travis* v. *Gary Community Mental Health Center, Inc.*, 921 F.2d 108 (7th Cir. 1990), *cert. denied*, 502 U.S. 812 (1991), the Seventh Circuit determined that punitive damages are available for a violation of 29 U.S.C. § 215(a)(3). *See Travis*, 921 F.2d at 111-12. One district court has held that punitive damages are not available under the FLSA, but with no analysis or discussion, and without mention of *Travis*. *See Waldermeyer* v. *ITT Consumer Financial Corp.*, 782 F.Supp. 86, 88 (E.D.Mo. 1991).[7]

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[7] Defendants also cite *Bowe v. SMC Elec. Products, Inc.*, 916 F.Supp. 1066, 1070 (D.Colo. 1996), in which the issue was not disputed by the parties; *E.E.O.C. v. Local 350, Plumbers and Pipefitters*, 842 F.Supp. 417, 422 (D.Nev. 1994), which concerned the ADEA; and *Glorioso v. Williams*, 130 F.R.D. 664, 665 (E.D.Wis. 1990), which concerned an employment discrimination complaint.

In support of their argument that punitive damages are not available for retaliation in violation of the FLSA, defendants note that the ADEA, enacted in 1967, contains similar language, permitting "such legal or equitable relief as may be appropriate . . ." 29 U.S.C. § 626(b). Defendants argue that because various Courts of Appeals have found punitive damages unavailable in ADEA cases, Congress intended FLSA damages to be similarly limited, despite the use of broad remedial language in the 1977 amendment. The difficulty with defendants' argument is that at the time the FLSA amendment was adopted, November 1, 1977, various courts with reported decisions concerning this issue had found punitive damages *were* available under the ADEA.[8] Some of these courts were later reversed, *subsequent to* the enactment

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[8] "Decisions allowing emotional distress or punitive damages in ADEA cases prior to amendment of the FLSA include: *Bertrand* v. *Orkin Exterminating Co., Inc.*, 419 F.Supp. 1123 (N.D.Ill. Aug. 1976) and 432 F.Supp. 952 (N.D.Ill May 1977); *Coates* v. *National Cash Register Co.*, 433 F.Supp. 655, 664 (W.D.Va. July 1977) *Murphy* v. *American Motors Sales Corp.*, 410 F.Supp. 1403 (N.D.Ga. April 1976); and *Walker* v. *Pettit Const. Co., Inc.*, 437 F.Supp. 730 (D.C.S.C. Sept. 1977).

Decisions not allowing punitive damages in ADEA cases prior to 1977 FLSA amendment: *Rogers* v. *Exxon Research & Engineering Co.*, 550 F.2d 834 (3rd Cir. January 20, 1977); *Dean* v. *American Sec. Ins. Co.*, 559 F.2d 1036 (5th Cir. Sept. 23, 1977); *Fellows* v. *Medford Corp.*, 431 F.Supp. 199 (D.C.Or. March 31, 1977); *Sant* v. *Mack Trucks, Inc.*, 424 F.Supp. 621 (N.D.Cal. Sept. 24, 1976).

of the FLSA amendment.[9] Due to the timing, Congress could not have relied upon these later appellate court decisions.

B. Sufficiency of the Evidence Concerning Punitive Damages

To prevail on their motion for judgment as a matter of law challenging the sufficiency of the evidence regarding punitive damages, defendants must establish that there was not "substantial evidence presented at trial to create an issue for the jury." *Landes Const. Co., Inc.* v. *Royal Bank of Canada*, 833 F.2d 1365, 1371 (9th Cir. 1987), *cert. denied*, 417 U.S. 932 (1974). The court must view the evidence in the light most favorable to the non-moving party and give that party the benefit of all reasonable inferences that may be drawn from the evidence. *See Hallmark Industry* v. *Reynolds Metals Co.*, 489 F.2d 8, 13 (9th Cir. 1973), *cert. denied*, 417 U.S. 932 (1974). Additionally, to prevail on their claim for a new trial, defendants have the burden of showing that the verdict is "against the clear weight of the evidence." *Landes*, 833 F.2d at 1371-72.

All defendants argue that punitive damages were inappropriately awarded by the jury because there was insufficient evidence of malice or reckless disregard of plaintiffs' rights to support such an award. The court is very familiar with the facts of this case, having ruled on numerous motions and having held a nearly three-week trial. Plaintiff presented much testimony and documentary evidence which supported their contentions that defendants were aware of the

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[9] Cases in which ADEA punitive damages were allowed at the time of the FLSA amendment, but which were later reversed: *Murphy* v. *American Motors Sales Corp.*, 410 F.Supp. 1403 (N.D.Ga. 1976 April 7, 1976), *rev'd* 570 F.2d 1226 (5th Cir. April 4, 1978); *Walker* v. *Pettit Const. Co., Inc.*, 437 F.Supp. 730 (D.C.S.C. Sept. 30, 1977), *rev'd*, 605 F.2d 128 (4th Cir. Sept. 5, 1979).

retaliation and approved of it. Defendants do not dispute that jury was properly instructed on the standard to be applied to the claim for punitive damages.

Viewing the evidence in the light most favorable to plaintiffs, there was substantial evidence of the following: defendants had a policy of not paying overtime; defendants persisted in violating overtime provisions despite being sued about it previously; defendants fired a group of employees (plaintiffs) for complaining about overtime practices; and defendants attempted to disguise their retaliatory motives. The jury apparently disbelieved defendants' witnesses' explanations of inconsistencies concerning the subject. There was more than substantial evidence of the malice and or reckless disregard of plaintiffs' rights by each defendant, which supports the punitive damages verdict against defendants.

The jury was instructed on the standard for assessing punitive damages and is presumed to have followed its instructions. The court also heard the evidence at trial and finds that there was substantial evidence to support the award of punitive damages against each defendant and that it was not contrary to the clear weight of the evidence.

C. Amount of Punitive Damages

All defendants argue that the amount of punitive damages awarded by the jury violates Due Process because it was excessive and the product of prejudice.

1. Passion or Prejudice

The individual and Corporate defendants[10] argue the amount of punitive damages was excessive and was the produce of passion and prejudice. The court rejects defendants' arguments about possible prejudice caused by plaintiffs' closing argument. The court finds that to the extent that defendants' voiced any objections to plaintiffs' counsel's remarks, the allegedly objectionable statement was sufficiently clarified for the jury and did not result in any prejudice to defendants. Additionally, the court notes that the jury was comprised of educated and articulate individuals who took extensive notes during trial and deliberated for two and a half days after the close of evidence. The jury calculated the lost wages[11] very precisely with respect to each individual plaintiff, and allocated the punitive damages against each defendant in a rational manner. The court finds that plaintiffs' counsel's

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[10] The court addressed the issue of the amount of punitive damages awarded against the Corporate defendants as a group. The Corporate defendants' Motion for Judgment as a Matter of Law asserts that Seattle Supersonics, Inc. and SSI Sports, Inc. are entitled to judgment as a matter of law on all claims and damages because the evidence was that defendant Full House Sports & Entertainment, Inc. terminated plaintiffs. This issue was never previously raised by defendants, and therefore cannot be raised now. Additionally, defendants stipulated to certain facts which make clear that the Corporate defendants are successor entities with the same employees and operations. Throughout the proceedings, both prior to and during trial, defendants themselves referred to the Corporate defendants jointly as "the Sonics" and did not distinguish among them. The court will not allow defendants to introduce new evidence as to which corporate defendant(s) should be held liable and which not liable given that defendants had ample opportunity to do this before and during trial and did not attempt to do so.

[11] The jury instructions indicated that the jury could consider awarding past and future lost wages. *See* Instruction No. 22.

remarks were not such that the jury would have been inflamed or confused about the proper standards to apply. Finally, the jury was instructed about the legal standards which were required to be met in order to award punitive damages, and are presumed to have followed them. The court finds that the award evidences reasoned calculations by the jury and does not appear to be the product of passion or prejudice resulting from plaintiffs' counsel's behavior or remarks.

2. The Amount of Punitive Damages Award

All defendants contend that the amount of the punitive damages award was excessive in violation of Due Process and must be remitted or set aside entirely. According to the recent Supreme Court case, *BMW of North America, Inc. v. Gore*, ___ U.S. ___, 116 S.Ct. 1589 (1996), the court should consider three "guideposts" in determining whether a person received fair notice of "the conduct that will subject him to punishment but also of the severity of the penalty" that may be constitutionally imposed. The three factors set out by the Supreme Court in *BMW* are as follows: the degree of reprehensibility; the ratio to the actual harm inflicted on plaintiffs; and sanctions for comparable misconduct. *Id.* at 1598-99.

a. Reprehensibility

With respect to the first factor set out in *BMW*, reprehensibility, the Supreme Court discussed various indicators, including the following: the blameworthiness of the wrong; the presence of trickery or deceit; intentional malice; the harm inflicted as a result of the conduct; whether the defendant has "engaged in prohibited conduct while knowing or suspecting that it was unlawful;" whether defendant could reasonably interpret the law to allow his behavior; evidence of bad faith; persisting in a course of conduct after it had been adjudged unlawful; deliberate false statements; acts of affirmative misconduct; and concealment of evidence of improper motive. *Id.* at 1599-1601.

The court has carefully considered each of the factors related to reprehensibility, and finds as follows: plaintiffs presented substantial evidence, and the jury implicitly found such evidence credible, of the following: defendants knowingly engaged in unlawful acts; defendants had previously been made aware of the requirements of the FLSA; defendants proceeded to willfully violate the FLSA; defendants could not reasonably interpret the law to permit retaliatory discharge for assertion of FLSA rights; defendants acted with malice toward plaintiffs; and defendants attempted to conceal their motivation in terminating plaintiffs. The court finds that the jury's award of punitive damages, after being instructed on the relevant standards, properly reflects a justifiable determination that defendants' conduct was reprehensible.

b. Ratio

The court next considers the ratio of the punitive damages awarded to the actual harm inflicted on plaintiffs. The Supreme Court has not set a precise ratio limit, but has indicated that the "proper inquiry is 'whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred.'" *BMW*, 116 S.Ct. at 1602, quoting *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443, 460 (1993). The *TXO* opinion "suggested that the relevant ratio was not more than 10 to 1." *BMW*, 116 S.Ct. at 1602.

The jury's findings concerning compensatory damages were that the wage losses that occurred in this matter totaled $697,000, while the emotional distress damages totaled $450,000.[12] The jury awarded punitive damages of $5 million

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[12] The jury awarded lost wages and emotional distress damages as follows: for Esther Ackley, $145,000 and $75,000, respectively; for Steve Belling, $139,000 and $75,000; for Patrick Cooke,

against the Corporate defendants, $4 million against Barry Ackerley, and $3 million against William Ackerley. Thus, the ratios are as follows:[13] as to the Corporate defendants, the ratio is $5 million to $1,147,000, or 4.35-to-1; as to Barry Ackerley, the ratio is $4 million to $1,147,000 or 3.48-to-1; as to William Ackerley, the ratio is $3 million to $1,147,000 or 2.61-to-1. The ratio of the total punitive damages to the total compensatory damages awarded ($12 million to $1,147,000) is 10.46-to-1.

The court finds that the ratio of punitive damages to the harm which occurred[14] in this matter is such that the court is concerned about this factor in the analysis. When the total punitive damages are compared with the total compensatory damages, the ratio of 10.46-to-1 exceeds the acceptable levels suggested by *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443.

$119,000 and $75,000; for Laura Lambert, $78,000 and $74,000; for Letitia Selk, $75,000 and $75,000; for Chuck Viltz, $141,000 and $75,000.

[13] Pursuant to the analysis used in *Transgo, Inc.* v. *Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1025 (1985), *cert. denied*, 474 U.S. 1059 (1986), the court assesses the ratio between punitive damages against each defendant and the compensatory damages for which all defendants are jointly and severally liable. The court also discusses the ratio between the total punitive damages award and the total compensatory damage award.

[14] Plaintiffs argue that the court should also consider the harm that was *likely to result* from defendant's conduct, not just the harm found by the jury. Thus, plaintiffs would include in the calculation of harm the potential damages of three terminated ticket sales agents who declined to join the lawsuit against defendants. The court finds it does not have sufficient evidence before it to accurately calculate the actual or potential harm to the three additional ticket sales agents and will not consider harm to them in its analysis.

c. Possible Sanctions

Finally, the court must consider possible sanctions for comparable misconduct. Under the FLSA, sanctions available in addition to lost wages and reinstatement of the employee include criminal sanctions of a $10,000 fine, which could amount to $10,000 per offense, totaling $120,000 (for willfully violating the overtime provisions of the law and for retaliating against plaintiffs by terminating their employment), or imprisonment of up to six months for a second violation. 29 U.S.C. § 216(a). Under 18 U.S.C. § 3571, sanctions available include a fine of twice the amount of pecuniary gain of loss resulting from the violation. Thus, the fine could be as large as twice the wage losses found, or approximately $1.4 million. The FLSA also has a liquidated damages provision in Section 216(b) which would provide for lost wages, plus an additional amount equal to lost wages.

d. William Ackerley

In addition to joining the arguments made by the other defendants, William Ackerley alleges that the punitive damages award against him is disproportionate to his personal wealth and is therefore inappropriately large. He presented some evidence of his financial worth at trial, and has supplemented this evidence with an affidavit presented to the court accompanying the post-trial Motion for Judgment as a Matter of Law.[15]

The court finds it inappropriate to consider the evidence William Ackerley failed to present at trial, particularly in light of plaintiffs' apparent inability to fully explore William

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[15] The court notes that plaintiffs indicated at oral argument that they were unable to depose William Ackerley as to some aspects of his financial worth in connection with defendants' post-trial motion, as defendants objected to certain questioning about his assets, or assets which may be available to him.

Ackerley's financial status. However, even if the court accepted as true the information in the post-trial affidavit, it would find that the punitive damages, as remitted below, are not unconstitutionally excessive as to William Ackerley.[16]

e. Remittitur

Based upon the factors set forth in *BMW*, and the evidence presented in this case, the court finds that the punitive damages awarded were excessive and will therefore GRANT defendants' motion for remittitur or, in the alternative, a new trial.[17] The court finds that an appropriate punitive damages award is double the lost wages found by the jury. In light of the potential civil and criminal penalties and/or fines under the relevant statutes, and in light of the evidence of malice or reckless disregard on the part of defendants, the court finds that punitive damages of this amount are within a range of penalties for which defendants receive "fair notice" and therefore may be constitutionally imposed. *See BMW*, 116 S.Ct. 1598.

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[16] It appears that the parent corporation Ackerley Communications, Inc. will indemnify the defendants. In its 1995 Annual Report filed with the Securities and Exchange Commission (10-K report), Ackerley Communications, Inc. stated as follows:

> Certain subsidiaries of the Company and two of its executive officers were defendants in a wrongful termination suit brought by former employees. On February 29, 1996, a jury issued a verdict awarding the plaintiffs compensatory and punitive damages of approximately $13.0 million. The Company has recorded an accrual of $14.2 million related to the verdict including an estimate for additional legal costs. The Company will appeal the verdict.

[17] To avoid conflict with the Seventh Amendment, plaintiffs are given the option of either accepting remittitur or proceeding with a new trial. *See Morgan v. Woessner*, 997 F.2d 1244, 1258-59 (9th Cir. 1993).

Therefore, with respect to each defendant, the court finds that a punitive damages award of $1,394,000 is appropriate.[18] Thus, assuming plaintiffs do not prefer a new trial, the compensatory damages in this case will remain at $697,000 plus $450,000 while the punitive damages liability will be $1,394,000 per defendant, for a total in punitive damages of $4,182,000.

V. Compensatory Damages

Defendants challenge several aspects of the compensatory damages awarded plaintiffs. First, they argue that the emotional distress damages awarded plaintiffs were the result of prejudice and passion rather than measured consideration of the evidence. They argue this is apparent due to the fact that plaintiffs were awarded equal amounts of emotional distress damages, and that the awards totaled $75,000 per plaintiff. The court finds that given the apparent careful consideration the jury gave the damage awards, and the distinctions it drew among plaintiffs' lost wages, the jury must have concluded that the emotional harm to each plaintiff was roughly equal given their similar treatment by defendants. The court finds that the emotional distress damages were reasonable in light of the evidence introduced at trial and were not the product of passion or prejudice.

The court also finds that the jury did not act unreasonably in awarding certain challenged compensatory damages to Pat Cooke. Based on the evidence at trial, the jury could have reasonably concluded that Pat Cooke need not have remained

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[18] As the jury, the court does not divide the punitive damages among the individual plaintiffs, but instead grants the punitive damages to plaintiffs as a group. By basing the punitive damages award upon the wage loss total found by the jury, the court does not intend to allocate the punitive damages unequally among the plaintiffs.

employed as an elevator music salesman, and that he did not unreasonably fail to mitigate his damages.

VI. Conclusion

Based upon the foregoing, the court hereby ORDERS remittitur as follows: plaintiffs' compensatory damages shall remain as determined by the jury; plaintiffs' punitive damages shall be remitted to $1,394,000 per defendant, for a total of $4,182,000, or plaintiffs may elect to have a new trial.

Within 14 days of this order, the parties shall submit an agreed proposed amended judgment or notify the court of plaintiffs' election of a new trial.

DATED at Seattle, Washington this 12th day of August, 1996.

/s/ Barbara Jacobs Rothstein
BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE

APPENDIX D

United States Court of Appeals
For the Ninth Circuit

Nos. 96-36017, 96-36266, 96-36267

D.C. No. CV-95-00039-BJR

Laura A. Lambert; Esther Ackley; Steve Belling; Pat Cooke; Letitia Selk; and Chuck Viltz,
Plaintiffs-Appellees-Cross-Appellants,

v.

Barry Ackerley; William Ackerley; Seattle Supersonics, Inc., a former Washington Corporation; SSI Sports, Inc., a Washington Corporation; and Full House Sports & Entertainment, Inc., a Washington Corporation,
Defendants-Appellants-Cross-Appellees.

Before: Browning, Pregerson, Reinhardt, Fernandez, Rymer, T.G. Nelson, Tashima, Thomas, Silverman, Wardlaw, W. Fletcher, Circuit Judges.

[Filed July 22, 1999]

The panel has voted to deny Appellants/Cross-Appellees' Petition for Rehearing with Suggestion for Rehearing En Banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX E

RELEVANT PROVISIONS OF THE UNITED STATES CONSTITUTION

Amendment V:

No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

Amendment VII:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

RELEVANT PROVISIONS OF THE FAIR LABOR STANDARDS ACT

Section 3(d), 29 U.S.C. § 203(d):

"Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

Section 15(a)(3), 29 U.S.C. § 215(a)(3):

[I]t shall be unlawful for any person * * *

to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee;

Section 16(b), 29 U.S.C. § 216(b):

* * * Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. * * *

(2)

No. 99-681

FILED
DEC
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

BARRY ACKERLEY, WILLIAM ACKERLEY, FULL HOUSE SPORTS & ENTERTAINMENT, INC., and SEATTLE SUPERSONICS, INC.,

Petitioners,

v.

LAURA A. LAMBERT, ESTHER ACKLEY, STEVE BELLING, PAT COOKE, LETITIA SELK, and CHUCK VILTZ,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

This is a retaliation case under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219. Respondents are six former season ticket sales agents for the Seattle Sonics basketball team. Petitioners are the corporate owners of the Sonics and Barry and William Ackerley, the individuals who decided to fire respondents because respondents filed a complaint seeking overtime compensation. The Ackerleys and their companies have a long history of unlawful employment practices, including refusal to pay overtime compensation as required by the FLSA. In an effort to change this unlawful policy, respondents requested an investigation by the Department of Labor, hired counsel, presented a formal written complaint to their employer, served a state court complaint, and negotiated a settlement of claims for overtime compensation.

After settling respondents' claims to avoid litigation, the Ackerleys retaliated against respondents by firing them. Such retaliation is a violation of the Fair Labor Standards Act in every federal circuit in the United States. The anti-retaliation provision of the FLSA, 29 U.S.C. § 215(a)(3), unambiguously prohibits employers from retaliating against employees because they have "filed any complaint or instituted or caused to be instituted any proceeding under the Act." That the employees in this case filed a complaint and instituted proceedings under the Act cannot reasonably be disputed. Affirmance of the jury's verdict in plaintiffs' favor on this issue by the district court and by the Ninth Circuit was a routine application of unambiguous statutory language.

Petitioners ask this Court to grant a writ of certiorari based primarily on the Second Circuit's decision in *Lambert v. Genesee Hospital*, 10 F.3d 46 (2d Cir. 1993), *cert. denied*, 511 U.S. 1052 (1994). In that case, the court held that employees do not engage in protected conduct when they

make an oral complaint about their pay without alleging that their employer is engaging in unlawful conduct. The Second Circuit noted:

> [Plaintiffs] merely complained that it was "not fair" that [plaintiff] did not receive charge-person pay for her duties, without stating that sex was the reason for the disparity.

10 F.3d at 55. Neither the Ninth Circuit nor any other federal court of appeals has held that employees like those in *Genesee Hospital*, who merely complained that their wages were "unfair," are protected by § 215(a)(3). Nor has the Second Circuit suggested that employees who are fired because they open a governmental investigation, serve a lawsuit, and file and settle a formal written complaint with their employer have no FLSA protection from retaliation. There is no conflict in the holdings of the Ninth and Second Circuits.

Petitioners' other arguments present no genuine legal issues at all, but involve only fact-bound challenges to evidentiary sufficiency and jury instructions – arguments that are based on inaccurate characterizations of the evidence and are, in any event, not appropriate grounds for granting a writ of certiorari. The Petition should be denied.

A. Facts

Petitioners present a lengthy and largely irrelevant factual recitation seemingly aimed at suggesting that respondents' complaints of overtime violations and retaliation were factually groundless. In contrast to petitioners' one-sided presentation, the evidence before the trial court demonstrated a long history of overtime violations and a clear case of retaliation. Indeed, it has never been disputed in this case that respondents were employees subject to the FLSA's overtime requirements, nor that

petitioners failed to compensate them for the actual amounts of overtime they worked, as required by law.

On May 16, 1994, at a ticket sales department meeting, respondents complained about not receiving overtime compensation. RT[2/7]:64-65 (SER 183-84). Respondents' immediate supervisor responded that: "Sales is a 24-hour-a-day job. There will be no overtime next year. You don't have to worry about it." RT[2/7]:66 (SER 185). After further discussion of the overtime issue among the respondents, the senior account executive, Laura Lambert, contacted the U.S. Department of Labor and requested information about whether the Sonics' overtime policies complied with the law. RT[2/7]:68-69 (SER 187-88).

On May 20, 1994, the Department of Labor advised Ms. Lambert that the Sonics' scheme violated the overtime laws. RT[2/7]:71-72 (SER 190-91). Ms. Lambert confronted Eddie Roldan, the payroll manager, and Brian Dixon, the vice-president for finance, with this information. Mr. Roldan and Mr. Dixon admitted that the Sonics had been violating the overtime laws; however, Mr. Dixon told Ms. Lambert that "his hands were tied" because "Ackerley will not pay overtime and doesn't care what the laws are." RT[2/7]:73-75 (SER 192-94). Mr. Dixon went on to tell Ms. Lambert that if she pursued the overtime issue:

> [Y]ou will definitely not have a job here, you will be fired. The decision is up to you. Everyone else in the office will love you, but you are jeopardizing your job. Is it worth it to you for a thousand dollars?

RT[2/7]:76-77 (SER 195-96).

Despite these threats, Ms. Lambert hired counsel. The account executives as a group selected Ms. Lambert and Chuck Viltz to represent them in discussions with Sonics management about compensation issues. RT[2/7]:83;

RT[2/9]:379 (SER 202, 265). On behalf of the respondents, Ms. Lambert presented the Sonics' management with a formal written request for overtime compensation. When this request proved unavailing, Ms. Lambert's attorneys served a Washington Superior Court complaint on Barry Ackerley, requesting that *all* of the account executives be paid overtime compensation as required by law. Exh. 53 (ER 117-18). Pending further discussions, the complaint was not filed with the court.

The Sonics then embarked on a course aimed not at complying with the law, but at silencing criticism, avoiding Ms. Lambert's lawsuit, and ridding themselves of employees who insisted on their legal rights. On October 6, 1994, John Dresel, on behalf of the Sonics, settled Ms. Lambert's overtime claims on terms that the Sonics insisted be kept secret. Exh. 1 (SER 70-74). Shortly afterward, Mr. Dresel purported to settle overtime compensation claims with each of the other respondents. Less than a week later, on October 12, 1994, Mr. Dresel prepared a secret memorandum to Bill Ackerley confirming that Mr. Dresel was "planning to layoff the entire ticketing sales staff by November 30." Exh. 2 (ER 113). The evidence showed that overtime complaints were the major management issue during the six days between the settlement with Laura Lambert and the decision to terminate her and the other respondents. Exh. 308 (SER 157); RT[2/20]:823 (SER 353); Exh. 309 (SER 158); Exh. 190 (SER 153-55); RT[2/20]:835-36 (SER 365-66).

On December 2, 1994, the Sonics fired nine of the ten employees in the ticket sales department, including the six respondents. Instruction 8 (Stipulations of Fact) at ¶ 12 (CR 192; SER 14). The Sonics were so bold as to preserve the job of Randy Novak, the one employee in the ticket sales department who had never complained. RT[2/12]:506-509 (SER 271-74). Mr. Novak was temporarily transferred to another department and then, shortly after the so-called

"restructuring" of the ticket sales department, returned to his old position. RT[2/12]:508-09; RT[2/20]:906 (SER 273-74, 427); RT[2/12]:509; RT[2/20]:907 (SER 274, 428).

Also shortly after the "restructuring," the Sonics announced new job openings for ticket sales account executives. Exh. A-202 (SER 161); *see* RT[2/21]:1135-36 (SER 443-44); *see also* Exh. 17 (SER 120-25). These announcements described positions identical to those respondents had previously held.

Although Sonics managers and attorneys continue to this day to follow a public relations script and claim that their action was a "restructuring," the overwhelming evidence at trial showed that the respondents were fired because they complained about the Sonics' unlawful overtime compensation policy. Despite elaborate steps, including alteration of evidence, to cover up Barry and Bill Ackerley's personal involvement in the decision to eliminate complaining employees, the evidence at trial showed that the Ackerleys personally directed the scheme.

B. Procedural History

After the firings, respondents sued in state court, claiming violations of the FLSA's overtime requirements and its anti-retaliation provision. Petitioners removed the case. United States District Judge Barbara Rothstein ruled on summary judgment that the Sonics violated the FLSA by failing to pay overtime compensation as required by the statute (a decision not challenged by the Sonics on appeal), and the case went to trial on the retaliation claims.

On February 29, 1996, the jury unanimously found that each of the plaintiffs was wrongfully terminated in retaliation for complaining of FLSA violations. The jury made a separate finding of liability against each of the defendants. The jury also made a separate finding that each of the defendants acted willfully. The jury made individual

awards of compensatory damages to each of the plaintiffs and imposed punitive damages against each of the defendants. (ER 59)

After trial, petitioners moved for judgment as a matter of law and for remittitur of the punitive damages award. The court denied the motion for judgment as a matter of law. Rejecting petitioners' argument that the FLSA did not protect respondents' activities, the court found:

> [B]ased on the evidence presented by plaintiffs concerning their activities, their acts rise to the level of protected activities under the FLSA. These activities include the following: complaints to managers by plaintiffs concerning defendants' overtime policies; contact with the Department of Labor; complaints to the Vice President of Finance; hiring an attorney to look into the issue; and delivery to Barry Ackerley of a complaint regarding this issue.

Order Denying Defendants' Motion for Judgment as a Matter of Law (ER 69 at ER 73).

The court also rejected as factually inaccurate defendants' claim that certain of the plaintiffs did not engage in sufficient protected conduct to be covered by the statute. The court explained:

> Plaintiff Laura Lambert spearheaded much of the complaining done by plaintiffs, but as John Dresel testified at trial, in his mind "the whole group [was] lumped together" at the time the plaintiffs were fired. In addition to finding that plaintiffs together participated in protected activity, the court finds that the overwhelming evidence at trial was that plaintiffs were treated as a group by

> defendants. The evidence also demonstrated that Lambert's complaints were voiced on behalf of the group of plaintiffs, and that defendants perceived the complaints to be on behalf of the group as a whole. Defendants negotiated with and treated Lambert as a representative and leader of the group of plaintiffs. Plaintiffs' theory of their case was that the entire group of ticket sales agents was terminated because defendants did not want to pay them overtime and the ticket sales staff had begun to complain about this. . . . [B]ased on the evidence presented, the court cannot find that this was an unreasonable conclusion for the jury to draw.

Id. at ER 77.

In addition, the court rejected petitioners' argument that Barry and William Ackerley should not be held personally liable for their misconduct. The court found that "Barry and William Ackerley had 'operational control,' had 'economic control over the relationship' with plaintiffs, . . . and were employers as that term is used in the FLSA." *Id.*

Carefully applying this Court's rulings in *BMW v. Gore*, 517 U.S. 559 (1996), and *TXO v. Alliance Resources Corp.*, 509 U.S. 443 (1993), the court granted defendants' motion for remittitur and reduced the amount of the punitive damage award as to each defendant. As instructed by this Court's decision, the district court assessed the individual responsibility of each defendant and found that:

> Plaintiffs presented substantial evidence, and the jury implicitly found such evidence credible, of the following: defendants knowingly engaged in unlawful acts; defendants had previously been made aware of the requirements of the FLSA; defendants

> proceeded to willfully violate the FLSA; defendants could not reasonably interpret the law to permit retaliatory discharge for assertion of FLSA rights; defendants acted with malice toward plaintiffs; and defendants attempted to conceal their motivation in terminating plaintiffs.

Order Denying Defendants' Motion for Judgment as a Matter of Law (ER 69 at ER 89). Nonetheless, considering the ratio of punitive and compensatory damages and the criminal penalties for such misconduct, the court found that the jury's punitive damages award was excessive and that an appropriate punitive damages award would be twice the amount of lost wages per defendant.

Defendants appealed. The initial decision of a three-judge panel of the Ninth Circuit was vacated, and the Ninth Circuit heard the case *en banc*. *Lambert v. Ackerley*, 180 F.3d 997 (9th Cir. 1999) (*en banc*). The Ninth Circuit affirmed the decision of the district court. The court held that plaintiffs engaged in protected conduct under the FLSA by filing a complaint with their employer, contacting the Department of Labor, and serving and settling a Superior Court lawsuit. The court affirmed the finding of individual liability against Barry and William Ackerley, finding that "[t]he jury heard extensive testimony that both Ackerleys were aware of and participated in the overtime dispute with the plaintiffs here, and were involved in the decision to terminate the sales staff." *Id.* at 1012. The court also affirmed the finding of the jury and the district court that all of the plaintiffs engaged in protected activity.

REASONS THE PETITION SHOULD BE DENIED

Review by this Court is not appropriate. The Ninth Circuit's holding is not inconsistent with the Second Circuit's holding in *Lambert v. Genesee Hospital*, 10 F.3d 46

(2d Cir. 1993), *cert. denied*, 511 U.S. 1052 (1994). In *Genesee Hospital*, the court held that an employee's informal statement to a supervisor that her compensation was "not fair" was not protected conduct under Section 215(a)(3). Here, respondents complained to the Department of Labor, filed a formal written demand for overtime with their employer, served a lawsuit, and negotiated a formal settlement. This would be protected conduct even under the narrowest conceivable reading of Section 215(a)(3). Petitioners also request that this Court review the evidence supporting the jury's decision on two issues of fact. There was ample evidence at trial supporting the jury's findings, and this Court does not review factual determinations on certiorari. The Petition should be denied.

I.

THIS CASE DOES NOT PRESENT A CIRCUIT CONFLICT

A. The Ninth Circuit's Holding Does Not Conflict With the Second Circuit's Holding in *Genesee Hospital*

Lambert v. Genesee Hospital, 10 F.3d 46 (2d Cir. 1993), *cert. denied*, 511 U.S. 1052 (1994), did not involve the filing of a written complaint with an employer, a complaint to a government agency, or the commencement of a lawsuit. The employees in *Genesee Hospital* did not even tell their employer they thought it was violating the law. Instead, the employees in that case made an oral complaint to a supervisor that a particular employee's compensation was "not fair," without so much as explaining what it was they thought was "unfair." The Second Circuit characterized this oral comment as an informal complaint and ruled that it was not protected conduct under § 215(a)(3).

Contrary to petitioners' claim, the Ninth Circuit did not "acknowledge that its decision conflicts with that of the

Second Circuit." Petition for a Writ of Certiorari at 11. The Ninth Circuit acknowledged only that the language of the Second Circuit's opinion expressed a view different from that of seven other circuits about whether "informal" complaints are protected under the FLSA. The Ninth Circuit also disagreed with the Second Circuit's reasoning that "the breadth of Title VII's anti-retaliation provision dictates the construction we should give the FLSA provision." 180 F.3d at 1005. The *holdings* of this case and the Second Circuit's decision in *Lambert v. Genesee Hospital*, however, are not in conflict.

Unlike *Genesee*, this case did not involve a mere oral complaint to supervisors that a compensation practice was "not fair" without an explicit or implicit invocation of the federal statute. In this case, the employees complained to the Department of Labor and received copies of the federal statutes and regulations from the Department of Labor. They prepared a written request for overtime supported by the statutes and regulations and presented it to the Sonics' Vice President for Finance. When the company refused to comply with the law, Laura Lambert hired legal counsel and served a state court complaint on Barry Ackerley demanding that all of the account executives be compensated in accordance with the FLSA. In contrast to *Genesee*, this case involves retaliation for an express written complaint asserting coverage and demanding payment under the FLSA, a complaint to the Department of Labor, the commencement of a formal legal proceeding by service of a complaint alleging violations of the FLSA, and a formal settlement by the employer of FLSA claims.

The Ninth Circuit has not encountered a case with facts remotely similar to those in *Lambert v. Genesee Hospital*. It remains to be seen whether the Ninth Circuit would hold an oral complaint that did not assert coverage under the statute to be protected activity. But all indications are that the Ninth Circuit would *not* disagree with the Second

Circuit's resolution of that issue. In this case, the Ninth Circuit declined to "describe the minimum specificity with which an employee must assert an alleged FLSA violation in order to find protection under § 215(a)(3)." 180 F.3d at 1008. But the Ninth Circuit *agreed* that "not all amorphous expressions of discontent constitute complaints filed within the meaning of § 215(a)(3)" – a proposition completely consistent with the holding of *Genesee Hospital*. *Id.* at 1007 (citing *Valerio v. Putnam Assoc., Inc.*, 173 F.3d 35, 44 (1st Cir. 1999)).

Thus, the Ninth Circuit's decision in this case by no means suggests that it would reach a result different from the Second Circuit's on the facts of *Genesee Hospital*. Nor do the Second Circuit's precedents clearly indicate that it would reach a result different from that of the Ninth Circuit on the facts of this case. Indeed, even while holding that the Act does not protect a generalized oral complaint of "unfairness," the *Genesee* court distinguished the Second Circuit's previous decision in *Brock v.Casey Truck Sales, Inc.*, 839 F.2d 872 (2d Cir. 1988). In that case, the Second Circuit held that employees who requested back pay compensation that the company had agreed with the Department of Labor to pay were protected from retaliation even though they had not filed a formal complaint in court or with the Department of Labor. In *Brock*, the Second Circuit observed:

> Courts have . . . not hesitated to apply the protection of section 15(a)(3) to activities less directly connected to formal proceedings where retaliatory conduct has a similar chilling effect on employees' assertion of rights.

Brock, 839 F.2d at 879. The *Genesee* court explained that, unlike the activity in *Brock* (and also unlike the actions in this case), the actions taken by the plaintiffs in *Genesee* were "neither the filing of a claim nor acts . . . that grew out of the

filing of claims. They are simply oral complaints to a supervisor." 10 F.3d at 55-56.

Thus, although the Second Circuit held in *Genesee* that generalized oral complaints are not protected conduct, it has not held that employees who file written complaints with their employer are unprotected. District courts within the Second Circuit applying *Lambert v. Genesee* have characterized the case as one involving a "verbal" or "oral" complaint to a supervisor. *See, e.g., Booze v. Shawmut Bank*, 62 F.Supp.2d 593, 598 (D. Conn. 1999). Neither the Second Circuit nor any district court within the Second Circuit has held that a written complaint expressly asserting coverage under the FLSA is not protected conduct under §215(a)(3). Nor has the Second Circuit or any other court of appeals held that contacting the Department of Labor to report a possible violation or serving a complaint in a lawsuit is not protected conduct under the statute.

Absent a ruling by the Second Circuit that a claim of retaliation is unavailable on facts comparable to those here, or a ruling by the Ninth Circuit that a nonspecific oral complaint like the one in *Genesee Hospital* would support a claim of retaliation, it is premature and speculative to suggest that there is a conflict between the Ninth and Second Circuits on an important question of law that this case should be used to resolve.[1]

---

[1] To the extent that petitioners suggest that the holding of *Genesee Hospital* conflicts in principle with the holdings of the Third and Eighth Circuits that the FLSA protects employees when their employers retaliate against them in the mistaken belief that they have engaged in protected conduct (*see Brock v. Richardson*, 812 F.2d 121 (3d Cir. 1987); *Saffels v. Rice*, 40 F.3d 1546 (8th Cir. 1994)), this case does not present any such conflict, and would not be an appropriate vehicle for attempting to resolve it. In any event, we note that the Court already declined to grant certiorari in *Genesee Hospital* itself to resolve that alleged conflict.

B. The Ninth Circuit Properly Construed Section 215(a)(3)

Section 215(a)(3) was designed to alleviate an employee's fear of retaliation for voicing a grievance. *EEOC v. White & Son Enters.*, 881 F.2d 1006, 1011 (11th Cir. 1989) (citing *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960)). To promote this purpose, every Circuit addressing the issue has held that informal complaints to and requests for information from the government constitute protected activities under § 215(a)(3). *EEOC v. Romeo Community Sch.*, 976 F.2d 985, 989 (6th Cir. 1992); *EEOC v. White & Son Enters.*, 881 F.2d at 1011 (11th Cir. 1989); *Brock v. Casey Truck Sales, Inc.*, 839 F.2d 872, 879 (2d Cir. 1988); *Brock v. Richardson*, 812 F.2d 121 (3d Cir. 1987); *Love v. RE/MAX of Am., Inc.*, 738 F.2d 383, 387 (10th Cir. 1984); *Brennan v. Maxey's Yamaha, Inc.*, 513 F.2d 179 (8th Cir. 1975).

Petitioners' proposed narrow reading of § 215(a)(3) would "do violence to the statute's goals." *Daniel v. Winn-Dixie Atlanta, Inc.*, 611 F. Supp. 57, 59 (N.D. Ga. 1985). The court in *Daniel* explained:

> Carrying the argument to its logical extremes, an employee who consulted, but did not file a complaint with, [the Wage and Hour Division of the United States Department of Labor] and who informed her employer first would not be protected as long as the employer fired her before she actually could file a complaint. The act would protect, however, an employee who never bothered to discuss matters with an employer, but who first filed a complaint. Such a result defies common sense, and is inimical to § 215(a)(3)'s purpose.

Id.

As this Court recognized in *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960), "effective enforcement [of the wage provisions of the FLSA] could . . . only be expected if employees felt free to approach officials with their grievances. . . . For it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions." *Id.* at 290. *See also Drollinger v. Arizona*, 962 F.2d 956, 958 n.2 (9th Cir. 1992) ("[T]he FLSA prohibits . . . violations in *anticipation* of assertions of coverage: any other interpretation would nullify the Act's protections." (emphasis in original)).

Petitioners' proposed construction of § 215(a)(3) is contrary to the statute's plain meaning. The statute provides:

> [I]t shall be unlawful for any person . . . to discharge or in any other manner discriminate against any employee because such employee has *filed any complaint or* instituted or caused to be *instituted any proceeding* under or related to this chapter, or has testified or is about to testify in any such proceedings, or has served or is about to serve on an industry committee.

29 U.S.C. § 215(a)(3) (emphasis added). The phrases "filed any complaint" and "instituted any proceeding" are not defined. Because the phrases are used in the disjunctive ("or" rather than "and"), filing a complaint must be something different from instituting a proceeding. Petitioners, however, conflate the requirements by asserting that a complaint is not a complaint unless it institutes a formal judicial or administrative proceeding.

Petitioners' interpretation not only confuses two separate forms of protected conduct, but also adds a requirement not set forth in the words of the statute. According to petitioners, to be protected, an employee must

do more than "file a complaint" or "institute a proceeding." The employee must choose a court or the Department of Labor as the forum. The statute, however, does not specify a forum. It requires only that the complaint or proceeding be "under or relating to this chapter." The forum could be the Department of Labor, a court, a union grievance committee, the employer, a mediation service or other settlement forum, or any other forum that could potentially lead to resolution of the employee's concerns. [2]

Thus, under the common meaning of the statutory terms, respondents instituted proceedings by commencing a management review of the overtime issue, initiating enforcement actions by the Department of Labor, and starting a settlement negotiation. Petitioners assert that such proceedings do not qualify and that even serving a state court complaint did not "institute a proceeding." But even if the statute required a lawsuit, Washington law provides that a lawsuit in Superior Court is commenced by serving the complaint on the defendant. Wash. R. Civ. P. 3(a).

Moreover, the dictionary definition of "complaint" clearly includes an expression of dissatisfaction to an employer.[3] Arguably, as the *Genesee* court appears to have concluded, the use of the term "filed" could require that any complaint be in writing. Respondents' complaint here was in

---

[2] The dictionary definition of "proceeding" is "1. PROCEDURE; 2. *pl:* EVENTS, HAPPENINGS; 3. *pl:* legal action <divorce~*s*>; 4: AFFAIR, TRANSACTION; 5: *pl:* an official record of things said or done." "Procedure" is defined as "1. a: a particular way of accomplishing something or of acting; b: a step in a procedure; 2: a. series of steps followed in a regular definite order <legal~>; 3: a. a traditional or established way of doing things; b: PROTOCOL." Webster's New Collegiate Dictionary 910 (1981).

[3] "Complaint" is defined as "1: expression of grief, pain, or resentment; 2. a: something that is the cause or subject of protest or outcry; b: a bodily ailment or disease; 3: a formal allegation against a party." Webster's New Collegiate Dictionary 228 (1981).

writing. And there is nothing in the statute that limits protection to those who file complaints in court or with the Department of Labor. On the contrary, the statute extends protection to those who file "any complaint," so long as the complaint is "under or related to" the FLSA. In *Genesee*, not only was the complaint oral, the plaintiffs simply complained that pay was unfair without invoking any statute. Thus, the complaint in *Genesee* could not fairly be characterized as "under or related" to the statute. The respondents here not only filed a written complaint of their own with their employer (in the form of their written demand for overtime), but also hired an attorney to serve a complaint in the form of a court pleading on their employer. Both complaints expressly asserted violations of the overtime laws. Section 215(a)(3) protects this conduct.

C. Petitioners' Proposed Interpretation of Section 215(a)(3) Would Amount to Judicial Repeal of the Statute

Petitioners claim that respondents' actions were not sufficiently formal to be protected against retaliation. The facts in this case make clear that the level of formality demanded by petitioners is totally unrealistic.

Respondents contacted the Department of Labor and reported petitioners' unlawful conduct. The Department of Labor provided highlighted copies of the relevant statutes to respondents and recommended that respondents discuss these materials with their employer. Petitioners suggest that respondents should have rejected the Department's recommendation and immediately insisted on a formal investigation. As a practical matter, this option did not even exist. As the Department explained in its *amicus curiae* brief to the Ninth Circuit, the Department does not and cannot launch a formal investigation in response to every employee complaint. *See* Brief for Secretary of Labor as *Amicus Curiae* at 9. Instead, the Department's enforcement

proceedings are aimed primarily at educating employers and seeking voluntary compliance with the FLSA. *Id.*

When petitioners rejected voluntary compliance efforts, respondents hired counsel and served a formal Superior Court complaint on petitioners. This resulted in negotiation of written settlement agreements before the lawsuit proceeded any further. Petitioners suggest that respondents should have refused to settle their claims at an early stage of the litigation. Otherwise, according to petitioners, respondents' employer was free to fire them for filing complaints about FLSA violations.

Petitioners' position would significantly impair the protection the law offers employees. Respondents in this case took actions clearly protected under the language of the statute. They filed a complaint with their employer. They instituted proceedings with their employer, with the Department of Labor, and in Superior Court. In all these actions, they made clear that they were claiming violations of the FLSA. If the statute protects anyone, it protects respondents.

II.

THE EVIDENCE AT TRIAL SUPPORTED THE JURY'S VERDICT THAT BARRY AND WILLIAM ACKERLEY ARE LIABLE

Petitioners argue that the lower courts erred in imposing personal liability on the Ackerleys for retaliating against them in violation of the FLSA, but they fail to identify any important legal question that merits this Court's attention. The petitioners concede, as they must, that the plain language of the statute sets forth a definition of "employer" under which individuals other than the corporation that nominally employs an employee may be liable for retaliation. The petitioners do not cite *any* decision of any court (let alone another federal court of appeals) that

has disagreed with the Ninth Circuit about the scope of the statutory definition of "employer." Nor do the petitioners cite any case holding, on similar facts, that individuals such as the Ackerleys may not be held liable under the FLSA. Thus, the petitioners' argument boils down to nothing more than a factbound claim that the evidence was insufficient to warrant the Act's application to them on these facts. This is the archetype of a claim that does not merit certiorari.

The FLSA grants an employee a private right of action against a person who has engaged in retaliation if that person is an "employer," a term that includes "any person acting directly or indirectly in the interest of an employer in relation to an employee . . . ." 29 U.S.C. §§ 215(a)(3), 216(b) & 203(d). The term "employer" is interpreted broadly to effectuate the FLSA's broad remedial purposes. *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1469 (9th Cir. 1983). In determining employer status under the FLSA, courts employ an "economic reality" test rather than common law concepts of agency. *Donovan v. Agnew*, 712 F.2d 1509, 1510 (1st Cir. 1983) (citing *Goldberg v. Whitaker House Co-op., Inc.*, 366 U.S. 28, 33 (1961)); *see Bonnette*, 704 F.2d at 1469.

Thus, federal courts have uniformly held that a corporate officer with "operational control" of a corporation is an employer, along with the corporation, and is jointly and severally liable under the FLSA. *United States Dep't of Labor v. Cole Enter., Inc.*, 62 F.3d 775, 778 (6th Cir. 1995); *Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962, 965 (6th Cir. 1991); *Brock v. Hamad*, 867 F.2d 804, 808 n.6 (4th Cir. 1989); *Donovan v. Grim Hotel Co.*, 747 F.2d 966, 972 (5th Cir. 1984), *cert. denied*, 471 U.S. 1124 (1985); *Agnew*, 712 F.2d at 1511 (1st Cir.). The indicia of "operational control" include: significant ownership interests, control of significant functions of the business, determination of salaries, and participation in hiring decisions. *Cole Enter.*, 62 F.3d at 778. "No one factor is dispositive"; rather, the courts must assess

the "economic realities" of each case. *Elliott Travel*, 942 F.2d at 965 (quoting *Donovan v. Sabine Irrigation Co.*, 695 F.2d 190, 195 (5th Cir. 1983), *cert. denied sub nom. Alberding v. Donovan*, 463 U.S. 1207 (1983)). Exclusive control over the corporation is *not* required, and the fact that other individuals handled many day-to-day functions does not preclude a finding of employer status. *Elliott Travel*, 942 F.2d at 966.

Petitioners have identified *no* appellate decisions that are in conflict with these principles. Consistent with this "overwhelming weight of authority," *Agnew*, 712 F.2d at 1511, the District Court instructed the jury:

> [Y]ou must determine whether either or both Barry Ackerley and William Ackerley are "employers." Under the [FLSA], a corporate officer or director with significant control of a subsidiary of a corporation is an employer along with the corporation. An individual need not have exclusive control over day to day functions of the subsidiary in order to be an employer under the FLSA. There may be more than one "employer" for purposes of the FLSA.
>
> Examples of the kinds of control an officer or director of a corporate employer must exercise to be an "employer" include, but are not limited to, the following: significant ownership interest with operational control of significant aspects of the corporation's day-to-day functions; the power to hire and fire employees; determination of salaries; maintaining employment records.

Instruction 19 (ER 361).

Under this standard, there was ample evidence at trial that Barry and William Ackerley were "employers" for purposes of the FLSA. There was also extensive evidence that Barry and William Ackerley personally retaliated against the plaintiffs. Petitioners' claim that "[t]here was not a shred of evidence that Barry Ackerley even knew of the plans to discharge [plaintiffs], or that William Ackerley had the slightest idea that Dresel's action was being taken to retaliate for Lambert's overtime complaint." Petition at 23. The claim is simply false. As both the district court and the Ninth Circuit confirmed, "the jury . . . heard extensive testimony that both Ackerleys were aware of and participated in the overtime dispute with the plaintiffs here, and were involved in the decision to terminate the sales staff." 180 F.3d at 1012. Indeed, to accept petitioners' claim that the Ackerleys were not involved in the decision would have required the jury to ignore an overwhelming body of evidence:

- The jury would have had to ignore that the Ackerleys' closely held corporation had a long-running policy of not paying overtime. Transcript at 666-67 (Feb. 16, 1996); Transcript at 1302-14 (Feb. 22, 1996).
- The jury would have had to ignore the numerous employee complaints and a federal court lawsuit over past overtime violations that put the Ackerleys on notice that their policy was unlawful.
- The jury would have had to ignore the fact that the letter detailing plaintiffs' overtime complaints was hand-delivered to Barry Ackerley's office. Trial Exhibit 53 (ER 117).
- The jury would have had to ignore John Dresel's testimony that he kept William Ackerley informed of day-to-day activities

and Barry Ackerley informed about important issues. Transcript at 763-64 (Feb. 16, 1996).

- The jury would have had to ignore entries in Mr. Dresel's calendar indicating that he conferred with Barry Ackerley about plaintiffs' complaints from the outset. Trial Exhibit 307 (ER 141).
- The jury would have had to ignore Mr. Dresel's note that "Barry [was] being told" of the retaliation strategy. Trial Exhibit 55 (ER 121).
- The jury would have had to ignore Mr. Dresel's admission that he attempted to alter evidence in order to conceal a calendar entry linking Barry Ackerley to the Laura Lambert strategy. Transcript at 268-69 (Feb. 20, 1996).
- The jury would have had to ignore the memorandum from Mr. Dresel informing Mr. Ackerley of the retaliatory firings. Trial Exhibit 2 (ER 113).
- The jury would have had to ignore Mr. Dresel's testimony that Eric Rubin (who was intimately involved in the unlawful plan) was so close to Mr. Ackerley that Mr. Dresel viewed telling Mr. Rubin as the equivalent of telling Mr. Ackerley. Transcript at 780 (Feb. 16, 1996).
- The jury would have had to ignore the references in Mr. Dresel's calendar to a two-hour meeting with Mr. Ackerley the day before and a follow-up telephone conversation with Mr. Ackerley on the same day that Mr. Dresel and Debbie Stednick first

discussed the plan. Trial Exhibits 54 and 307 (ER 119 and ER 141).

- The jury would have had to ignore evidence that both inside and outside public relations consultants were used to develop a plausible cover story for the retaliatory firings. Trial Exhibits 6 and 7 (SER 80 and SER 82).
- The jury would have had to ignore evidence that Barry Ackerley was personally involved in employee terminations and actively participated in other issues relating to ticket sales. Transcript at 780-82 (Feb. 16, 1996).
- The jury would have had to ignore evidence that Mr. Ackerley exerted such a high degree of control over Mr. Dresel that he had a special telephone line into Mr. Dresel's office that activated a warning light above Mr. Dresel's door (the "bat phone"). Transcript at 1292 (Feb. 22, 1996).
- The jury would have had to ignore that Mr. Dresel's calendar shows he called Mr. Ackerley on the morning of December 2, the day of the firings. Trial Exhibit 311 (ER 160).
- The list goes on.

Understandably, the jury was unable to stretch its imagination as far as petitioners would have liked. Instead, the jury drew the only reasonable inference from the evidence: that the Ackerleys not only knew of, but directed, the retaliatory firing of respondents. Even if the correctness of the jury's, the district court's, and the Ninth Circuit's assessment of the evidence were an appropriate issue for this Court, there is no reason to question their conclusion.

III.

THE EVIDENCE AT TRIAL SUPPORTED THE JURY'S AND THE DISTRICT COURT'S DETERMINATIONS THAT PLAINTIFFS AS A GROUP ENGAGED IN PROTECTED ACTIVITIES

Petitioners argue that the respondents other than Ms. Lambert were not entitled to recover because, even if Ms. Lambert's actions were protected, the other employees did not engage in protected activity. On this issue, even the dissenting judges below agreed with the majority. *See* 180 F.3d at 1016. The Ninth Circuit's unanimous determination that there was enough evidence of protected conduct by the other employees to sustain the verdict is a quintessentially fact-bound and non-certworthy issue. Petitioners, however, try to characterize it as an important legal issue by arguing that the jury instructions on this issue were erroneous and that the Ninth Circuit's implicit application of the harmless error standard to those instructions violated petitioners' Seventh Amendment right to a jury trial.

There are many reasons why this issue does not merit a grant of certiorari. *First*, the Ninth Circuit did not explicitly address either the correctness of the jury instruction or the question of harmless error, so it is impossible to say that its opinion resolves any important legal issue in a manner that either creates conflict among the federal courts or establishes a precedent that requires correction by this Court. *Second*, the petitioners' argument depends on the underlying notion that the jury instruction given at the trial was erroneous. Petitioners identify no decisions from any federal appellate court, or, indeed from any court at any level, that hold such an instruction to be erroneous. Thus, there is no basis for concluding that this underlying legal issue is sufficiently important to require this Court's attention.

Third, assuming that petitioners are correct that the Ninth Circuit implicitly found the instruction to be erroneous

and applied a harmless error analysis to it, there is no reason to believe that the standard followed by the Ninth Circuit in applying harmless error analysis to civil jury instructions merits review by this Court. Petitioners cannot assert that sustaining a verdict in a civil case in the face of an erroneous jury instruction always violates the Seventh Amendment or that an erroneous jury instruction can never be harmless error. (Indeed, even in the criminal cases on which petitioners rely, an incorrect jury instruction on an element of an offense can be harmless error. *See Neder v. United States*, 119 S. Ct. 1827 (1999).) The standard followed by the Ninth Circuit in determining whether erroneous jury instructions require reversal in a civil case is that "an error in instructing the jury in a civil case does not require reversal if the error was 'more probably than not harmless,'" such that "'the evidence would have supported a verdict for the plaintiff even with th[e requested] instruction.'" 180 F.3d at 1008 (citations omitted; brackets in original). Petitioners do not argue that this standard is erroneous, nor do they cite any conflicting authority from any court of appeals – let alone anything suggesting that the Ninth Circuit's standard violates the Seventh Amendment.

Finally, whether the Ninth Circuit properly applied the harmless error standard in this case is just another fact-specific issue with no general importance. Moreover, the Ninth Circuit's careful explanation of the evidence supporting the respondents' position that all the affected employees engaged in protected activity belies any suggestion that the court erred in assessing the facts.[4]

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[4] Petitioners falsely assert that "[t]he only one of the six respondents who actually communicated with the company regarding the subject of overtime was Lambert." Petition at 25. The testimony at trial was that each of the respondents communicated with the petitioners about overtime, not only through their spokesperson, Ms. Lambert, but also directly at sales meetings.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court of the United States

BARRY ACKERLEY, *et al.*,

Petitioners,

v.

LAURA A. LAMBERT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITIONERS

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This Brief is submitted by The Chamber of Commerce of the United States of America (the "Chamber"), as *amicus curiae* in support of petitioners.[1]

INTEREST OF AMICUS CURIAE

1. The Chamber is the largest federation of business companies and associations in the world. With substantial membership in each of the fifty states, the Chamber represents an underlying membership of nearly three million businesses and organizations, with 140,000 direct members of every size, in every sector and region of the country. An important function of the Chamber is to represent the interests of its members in important matters before the courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the federal government. Accordingly, the Chamber has sought to advance those interests by filing briefs in more than 500 cases of importance to the business community. Those cases include the Court's recent decision regarding the Fair Labor Standards Act ("FLSA" or the "Act"), *Auer v. Robbins*, 519 U.S. 452 (1997), as well as other cases dealing with various aspects of federal employment law. *See, e.g., Kolstad v. ADA*, 119 S. Ct. 2118 (1999); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998); *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996); *McKennon v. Nashville Banner Publ'g. Co.*, 513 U.S. 352 (1995); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

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1. This brief was written entirely by counsel for the Chamber of Commerce of the United States, and no entity other than *amicus curiae*, its members, or its counsel has made any monetary contribution to the preparation or submission of the brief. The brief is filed with the consent of all parties. Copies of the letters of consent have been lodged with the Clerk of the Court.

2. The court of appeals' decision in this case will have an immediate and profoundly negative impact on the Chamber's members if it is not reviewed by this Court. The decision below undermines the single, overriding desire of every American business with respect to the enforcement of federal employment laws — the desire for intelligible standards uniformly applied. Because the court of appeals decision deepens an existing division of authority among the courts of appeals on two important questions, the decision leaves different employers — and different operations of the same employer — subject to different rules of law.

3. The decision below purports to make individual managers personally liable for FLSA violations — even when those violations stem from good faith but mistaken judgments about the requirements of the Act. The decision thus will make management responsibilities substantially less attractive to individuals employed by Chamber members. This, in turn, will make even more difficult the efforts of American business to find and cultivate the managerial skills upon which Chamber members rely for effective implementation of federal employment law, including the FLSA. Because the Chamber is uniquely situated to bring the concerns of American business to the Court, it submits this brief.

REASONS FOR GRANTING THE WRIT

Uniformity and predictability in the law are among the most important goals sought by the Chamber and its members. The Chamber often has strong views about the proper interpretation and application of various federal laws that regulate the employment relationship, including the FLSA. More important to the Chamber, its members, and

the individuals they employ than any particular construction of federal law, however, is the existence of uniform, predictable, and easily-understood standards governing employer and managerial conduct.

The interests of clarity, uniformity, and predictability were roughly treated in the decision below. First, the decision broadens an existing division of authority on the threshold question posed in this case: whether an individual "fil[es] a complaint" — and thus triggers the anti-retaliation provisions of the Fair Labor Standard Act — when he complains to his boss about his overtime wages. 29 U.S.C. § 215(a)(3).

As explained below, the language of the Act, its legislative history, and the relationship of the FLSA's anti-retaliation language to language used in various other employment statutes all indicate that the answer to this question must be "no." But whatever the Court's conclusion on the merits of this question, it is inherently unsatisfactory to have employees and employers in different states subject to different rules of substantive liability on a question of such obvious importance.

Second, the decision below adopts a dangerously flawed methodology for statutory construction incompatible with this Court's opinions. The court of appeals' rationale rested, not on the plain language of the statute or its legislative history, or on the basis of any other accepted canon of statutory construction, but on what it perceived as the "animating spirit" of the Act.[2] This focus on policy objectives, rather than statutory analysis, produced "judicial

2. Pet. App. 8a.

legislation"[3] rather than statutory construction, "judge-made law . . . based on self-mesmerized views of economic and social theory."[4] The interests of justice are undermined whenever courts leave behind the enacted text of a statute in a search for its "spirit." The goal of predictability suffers when employers and employees must divine the "spirit" of the law to determine what it requires, rather than simply read the language selected by Congress.

Finally, the court of appeals' decision underscores the lower courts' confusion regarding a central question under the FLSA: whether, and if so in what circumstances, individual managers can be held liable as statutory "employers" for violations of the FLSA. According to the decision below, every manager is a statutory "employer" — and thus every manager can be held individually liable for mistaken wage payments — so long as the manager has "control over the nature and structure of the employment relationship. . . ." Pet. App. 25a.

This amorphous standard undermines this Court's more recent effort to rationalize and unify the standards of liability under employment statutes. The rationale adopted by the court of appeals would make managers — even entirely innocent ones — personally liable should their companies make erroneous judgments about who is and is not exempt from the overtime requirements of the Act, and what is and is not compensable time. Such an unfair and punitive standard

3. *Addison v. Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 618 (1944).

4. *Burlington Northern R.R. v. Brotherhood of Maintenance of Way Employees*, 481 U.S. 429, 453 (1987) (*quoting Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 382 (1969)).

creates a powerful disincentive for individuals considering management responsibilities.

I.

THIS COURT SHOULD RESOLVE A PATENT CONFLICT AMONG THE CIRCUITS REGARDING THE SCOPE OF THE FLSA'S ANTI-RETALIATION PROVISION AND BRING THE NINTH CIRCUIT'S METHODOLOGY FOR STATUTORY CONSTRUCTION INTO LINE WITH THIS COURT'S OPINIONS.

A. The Conflict Is Patent, The Question Posed Is Important, And The Conflict Can Be Resolved Only By This Court

As the Ninth Circuit itself recognized in its opinion, its decision deepens a direct conflict among the courts of appeals on the threshold question posed in this case: whether an employee triggers the anti-retaliation provisions of the Fair Labor Standards Act by expressing to his employer a disagreement regarding overtime wages. Pet. App. 6a-7a.[5] The provision extends protection to those that have "filed a complaint" under or related to the FLSA. 29 U.S.C. § 215(a)(3). The Ninth Circuit held that informal expressions of disagreement amount to "filed . . . complaint[s]" — overruling a panel decision to the contrary. Pet. App. 9a-10a. Several other circuits have agreed. *Id.* at 6a-7a (collecting cases). The Second Circuit has held (as have a number of district courts) that this kind of complaint is not sufficient.[6] Only this Court can resolve this conflict.

5. The plaintiffs in this case put their wage demands in writing, but in the Ninth Circuit's view, neither the form nor the forum of the expressed disagreement matters; any expressed dissatisfaction qualifies as a "filed . . . complaint."

6. *Lambert v. Genesee Hosp.*, 10 F.3d 46, 55 (2d Cir. 1993), *cert. denied*, 511 U.S. 1052 (1994); *O'Neill v. Allendale Mut. Ins.*

(Cont'd)

This Court has noted that there are circumstances in which divisions of opinion among the circuit courts on questions of federal law are tolerable. For example, the split of authority may concern a question of law that is technical or unimportant, or that arises too infrequently, to warrant treatment by the Court. Similarly, the Court has declined to review cases involving circuit splits — even on important issues — where only a few lower courts have addressed the issue and the questions presented require "further study" in the lower courts.[7] Finally, the Court has declined to review cases where a disagreement among the courts of appeals on a matter of law has been overtaken by subsequent events — for example, when the underlying statute has since been amended or has expired.[8]

None of these circumstances is present here. The FLSA's anti-retaliation prohibition applies to every "person" in the country, 29 U.S.C. § 215(a); the law's overtime and minimum wage requirements apply to quite nearly every employer, 29 U.S.C. §§ 206(a), 207(a); and the majority of employees in the national economy are protected by the FLSA's wage standards. The issue presented here has arisen repeatedly and undoubtedly will arise again and again; it is the subject of at least eight published circuit court opinions.[9]

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Co., 956 F. Supp. 661, 664 (E.D. Va. 1997); *see Ball v. Memphis Bar-B-Q Co.*, 34 F. Supp.2d 342, 346 (E.D. Va. 1999); and *Clevinger v. Motel Sleepers, Inc.*, 36 F. Supp.2d 322, 324 (W.D. Va. 1999).

7. *See McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J.; dissenting from the denial of *cert.*); *Gilliard v. Mississippi*, 464 U.S. 867, 869 (1983) (Marshall, J.; dissenting from the denial of *cert.*).

8. *See* ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 4.4, at 172 (7th ed. 1993).

9. *See, e.g., Conner v. Schnuck Mkts.*, 121 F.3d 1390 (10th Cir. 1997); *McKenzie v. Renberg's, Inc.*, 94 F.3d 1478 (10th Cir. 1996),
(Cont'd)

This controversy is a live and important one, and it will not go away unless and until this Court resolves the matter.

B. The Ninth Circuit's Methodology For Statutory Construction Cannot Be Reconciled With This Court's Decisions

This Court has marked out the proper procedure for analyzing statutory language on many occasions. The process is supposed to begin (and in the great run of cases, will end) with the language of the statute itself.[10]

The statutory language in this case protects from discrimination those who have "filed a complaint" relating to the FLSA. 29 U.S.C. § 215(a)(3). The Ninth Circuit read the word "filed" to mean "uttered" or "expressed" and the word "complaint" to mean "disagreement."

To achieve this result, the court of appeals was compelled to adopt an unwarranted perversion of the ordinary process for

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cert. denied, 520 U.S. 1186 (1997); *Saffels v. Rice*, 40 F.3d 1546, 1548 (8th Cir. 1994); *EEOC v. Romeo Community Schs.*, 976 F.2d 985 (6th Cir. 1992); *EEOC v. White & Son Enterps.*, 881 F.2d 1006 (11th Cir. 1989); *Brock v. Richardson*, 812 F.2d 121 (3d Cir. 1987); *Love v. Re/Max of America, Inc.*, 738 F.2d 383 (10th Cir. 1984); *Brennan v. Maxey's Yamaha, Inc.*, 513 F.2d 179 (8th Cir. 1975).

10. "[T]he meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917); *see also Diamond v. Chakrabarty*, 447 U.S. 303, 308 (1980) ("cases of statutory construction . . . begin, of course, with the language of the statute"); *Southeastern Community College v. Davis*, 442 U.S. 397, 405 (1979) (same).

statutory construction. Rather than beginning with the text of the statute, the statutory language entered the court of appeals' analysis only at the end. The court reasoned that: (1) the FLSA is "humanitarian" legislation, and thus, whenever possible, it must be broadly construed in favor of plaintiffs[11]; (2) unless the phrase "file a complaint" includes water-cooler conversations as well as court and agency filings, individuals making informal complaints of this sort will be without protection; and (3) the phrase "filed a complaint" is elastic enough to embrace a construction in which the word "file" means "utter." At each step in this reasoning, the court erred.

First, courts enforce statutes, not purposes. Unless the words selected by Congress are truly ambiguous, extrinsic aids to construction are simply irrelevant. More specifically, "rules" of statutory construction, like the remedial or humanitarian purposes of a piece of legislation, "are only admissible to solve doubt not to create it." *Railroad Comm'n of Wisconsin v. Chicago Burlington & Quincy R.R.*, 257 U.S. 563, 588-89 (1922); *see also United States v. Oregon*, 366 U.S. 643, 648 (1961).[12]

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11. The "plaintiffs win" rule of construction endorsed below fails to acknowledge that the legislative process is fueled by compromise. Indeed, the FLSA itself is remarkable as much for its exceptions, exemptions, and limitations as it is for its prohibitions and applications. To assume away the possibility that Congress intended to narrow the breadth of a portion of the Act — even when presented by compelling evidence that such a construction was intended — is to predetermine the judicial inquiry before it has even begun.

12. *United States v. James*, 478 U.S. 597, 605 (1986) ("assertions of ambiguity do not transform a clear statute into an ambiguous provision"), *citing TVA v. Hill*, 437 U.S. 153, 173 and n.18 (1978).

Second, according to the court's opinion, the plaintiffs in this case were terminated en masse for complaining that as ticket sales agents, they were entitled to overtime wages. The kind of conduct the court described — resort to "mutual aid or protection" to secure better terms and conditions of employment — is explicitly protected by the National Labor Relations Act, 29 U.S.C. § 157, and anyone terminated for exercising this right can obtain relief from the National Labor Relations Board. Had the plaintiffs pursued their NLRA remedies, they would not have received a jury trial — or the runaway punitive damage award returned by the jury in this case — but the Ninth Circuit's apparent belief that only a broad construction of the FLSA could protect these individuals is simply wrong.

Third, it is simply not possible to construe the word "filed" to mean "expressed." Congress plainly understood the phrase "filed a complaint" in its "familiar legal sense."[13] An individual "files a complaint" when she takes formal steps to invoke the protections of the Act. Under any reasonable construction of the phrase, an employee does not "file a complaint" when he has an oral exchange with his boss, or sends her an email or a memo describing his dissatisfaction.

The court of appeals offered only one explanation for its construction — other than the Act's "animating spirit" — *i.e.*, that Congress would have known that someone instituting a union grievance proceeding is often said to have "filed" a grievance. Pet. App. at 9a-10a. We can presume that Congress was aware that union members "file" grievances, and some day the Court may be asked to decide

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13. *Bradley v. United States*, 410 U.S. 605, 609 (1973), *quoting*, *Henry v. United States*, 251 U.S. 393, 395 (1920).

whether the formal invocation of a union grievance procedure constitutes the filing of a complaint related to the FLSA, but that question is not posed here, and the court of appeals did not limit its holding to the initiation of such a formal process. Rather, the court held that any employee gripe on the subject of overtime constitutes a "filed complaint." The plain language of the statute will not bear that result.

Finally, even if the language is ambiguous, the court of appeals dismissed far too quickly the compelling evidence that Congress intended the FLSA to have a more limited anti-retaliation provision than other federal employment laws. The court acknowledged that the anti-retaliation provision in Title VII, unlike the FLSA, explicitly prohibits discrimination against anyone who has *either* instituted a proceeding under that Act (*i.e.*, filed a complaint) *or* "opposed any practice made an unlawful employment practice by [Title VII]," for example by complaining about discrimination to the employer. 42 U.S.C. § 2000e-3(a). The court found this difference unenlightening, however, explaining that the FLSA was enacted long ago, in 1938, at a time "when statutes were far shorter and less detailed" than they were 26 years later when Title VII was passed. Pet. App. 11a.

One need not engage in such a dubious "generational" analysis, however, to divine Congress's understanding of the statute. The Senate version of the FLSA initially contained an anti-retaliation provision which explicitly prevented an employer from taking adverse action against an employee because the employer believed the employee "may" file a complaint. S. 2475 § 22(c), 83 Cong. Rec. 1577 (1937). This version of the anti-retaliation provision was defeated, however, and it was replaced by the existing one, which extends only to "filed . . . complaint[s]," not anticipated or threatened ones.

Moreover, the court of appeals' "generational" analysis cannot explain away the starkly different anti-retaliation provisions in the FLSA, on the one hand, and Title VII, the Age Discrimination in Employment Act, the Family and Medical Leave Act, and the Americans with Disabilities Act on the other. *All* of these other statutes contain provisions explicitly protecting those who "oppose" discriminatory practices through internal complaints.[14] *Only* the FLSA limits the reach of its anti-retaliation provision to those "fil[ing] complaint[s]." Indeed, in 1966, when Senator Javits initially introduced legislation to address the problem of age discrimination, he proposed an amendment to the FLSA and, presumably knowing that the FLSA's existing anti-retaliation provision contained no "opposition clause," he imported into the FLSA *Title VII*'s anti-retaliation language. H.R. 13712, 89th Cong. 2d Sess. § 601((f)(3) (1966). When the Age Discrimination in Employment Act became law the next year as a free-standing piece of legislation, it expressly incorporated the procedures of the FLSA, 29 U.S.C. § 626, but nonetheless adopted an anti-retaliation provision modeled on Title VII's opposition clause. 29 U.S.C. § 623(d).[15]

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14. *See* 42 U.S.C. § 2000e-3(a) (Title VII); 29 U.S.C. § 623(d) (ADEA); 42 U.S.C. § 12203(a) (ADA); 29 U.S.C. § 2615(a)(2) (FMLA).

15. Congress had good reason to include a less expansive anti-retaliation provision in the FLSA than in discrimination statutes such as Title VII. Title VII depends for its enforcement largely on voluntary compliance, not formal litigation; protecting individuals engaged in informal efforts to secure compliance encourages these non-litigation modes of dispute resolution. *International Ass'n of Firefighters v. Cleveland*, 478 U.S. 501, 515 (1986) ("We have on numerous occasions recognized that Congress intended voluntary compliance to be the preferred means of achieving the objectives of

(Cont'd)

The court of appeals evidently concluded that the plain language of the FLSA's anti-retaliation provision was inadequate to serve what the court viewed as important policy goals. The judiciary's role, however, "is to apply the text, not to improve upon it." *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 126 (1989) (superseded by amended rule on other grounds).

II.

THE COURT SHOULD GRANT CERTIORARI TO ESTABLISH MEANINGFUL GUIDELINES FOR COURTS TO USE IN DETERMINING WHETHER, AND IF SO UNDER WHAT CIRCUMSTANCES, INDIVIDUAL MANAGERS MAY BE HELD ACCOUNTABLE FOR VIOLATIONS OF THE FLSA.

"[T]here is in the Fair Labor Standards Act no definition that solves problems as to the limits of the employer-employee relationship under the Act." *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 (1947). The statutory definitions of the terms "employer," "employee," and "employ"[16] have only "some bearing" on these problems. *Rutherford Food*, 331 U.S. at 728.

(Cont'd)
Title VII"). The FLSA enforcement scheme, by contrast, relies on the primacy of government action, and individuals are actually *precluded* from engaging in binding, informal dispute resolution without government supervision. *See* 29 U.S.C. § 216(c); *Mitchell v. DeMario Jewelry, Inc.*, 361 U.S. 288, 292-93 (1960). Thus, the very different anti-retaliation provisions effectively channel complaints into the arenas where Congress intended them to be resolved.

16. According to the FLSA, the term "'[e]mployer' includes any person acting directly or indirectly in the interest of an employer (Cont'd)

Given the ambiguity of the statutory standards, their potentially breathtaking scope, and the almost total lack of guidance from this Court, the Department of Labor and the courts of appeals have adopted, not surprisingly, quite different standards for determining when an individual manager may be liable for overtime or minimum wage payments required by the Act:

- In *Donovan v. Agnew*, 712 F.2d 1509 (1st Cir. 1983), the First Circuit held two corporate officers individually liable because they held "a significant ownership interest [in the business and] operational control of significant aspects of the corporation's day to day functions, including compensation of employees and [because they] personally made decisions" which lead to the alleged violations. *Id.* at 1514. *See also Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 679 (1st Cir. 1998) (dominant factor in determining personal liability is whether corporate officers involved personally made the determination to violate the Act).

- The Second Circuit asks "whether the alleged employer possessed the power to control the workers in question . . . with an eye" to the four-factor "economic reality" test of whether the alleged employer (1) had the power to hire and fire the

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(Cont'd)
in relation to an employee," 29 U.S.C. § 203(d), the term "'employee' means any individual employed by an employer," *id.* § 203(e)(1), and the term "'[e]mploy' includes to suffer or permit to work," *id.* § 203(g).

employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records. *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999). An equity interest in the enterprise is not required. *Accord Donovan v. Sabine Irrigation Co.*, 695 F.2d 190, 194-95 (5th Cir.), *cert. denied sub nom. Alberding v. Donovan*, 463 U.S. 1207 (1983).

- The Eleventh Circuit has applied a "total employment situation" test. It relies on three unweighted factors, and does not appear to require culpability on the part of the individual manager. The court considers (1) whether the plaintiff was employed on the premises of the alleged employer, (2) how much control the alleged employer exerted on the employees, and (3) whether the alleged employer had the power to fire, hire, or modify the employment condition of the employees. *Welch v. Laney*, 57 F.3d 1004, 1011 (11th Cir. 1995). No equity interest is necessary.

- The Department of Labor has taken the position that any individual manager can be held personally liable for FLSA violations so long as the manager "exercised control over the work situation." *Baystate*, 163 F.3d at 677.

The Ninth Circuit has devised its own, open-ended standard. According to the court below, "[w]here an individual exercises 'control over the nature and structure of the employment relationship,' or 'economic control' over the relationship, that individual is an employer within the meaning of the Act, and is subject to liability." Pet. App.

25a.[17] Under this definition, *any* individual who happens to set another employee's schedule, evaluate his performance, or exercise any control over where and how the employee is to perform his job, qualifies as an employer and therefore is financially responsibility for wage and hour violations. For liability to attach under this standard, the plaintiff need not prove that the manager played any role whatever in the violation alleged.

Imposition of liability on this basis is anti-textual. The statute makes it "unlawful for any person" to pay sub-minimum wages or to refuse to pay required overtime, 29 U.S.C. § 215(a)(2), and provides that the "employer who violates" these provisions, or who engages in proscribed retaliation may be held liable. 29 U.S.C. § 216(b). But an individual — even one who is deemed to be an "employer" — cannot be held liable for damages unless he or she *personally violates the Act's provisions.*

The Ninth Circuit's liability scheme is also grossly unfair. Suppose, for example, a manager is informed by her superiors that the company has consulted with legal counsel and, based on a court of appeals decision from another circuit, has been advised that one hundred of the managers' subordinates are exempt from the FLSA's overtime requirements. *See generally* 29 U.S.C. § 213. On the basis

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17. The court of appeals concluded that the district court's instruction in the case was "entirely consistent" with the appellate court's formulation, even though the instruction required, as a precursor to individual liability, a finding that the individual defendants had a "significant ownership interest" in the enterprise. *Id.* It is unclear from these two sentences whether an ownership interest is or is not a predicate to individual liability in the Ninth Circuit.

of this legal advice, the company instructs the manager not to pay these subordinates overtime wages.

In subsequent litigation against the manager, in a case of first impression in the circuit, the court of appeals holds that the employees are not exempt and that the employees are entitled to overtime compensation. The manager qualifies as an employer under the Ninth Circuit's definition, and thus she would responsible for two years of overtime payments to her one hundred employees. In the Ninth Circuit's view, it would be irrelevant to the manager's individual liability both (1) that the manager was uninvolved in the challenged decision and (2) that the company had a good faith basis for its classification decision.

Consistent with the Court's recent approach to analogous federal employment statutes,[18] the Court should take this opportunity to resolve the confusion pervading the circuits with regard to whether, and if so under what circumstances, FLSA liability attaches to individual managers.

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18. *Cf. Kolstad v. American Dental Ass'n*, 119 S. Ct. 2118, 2126-30 (1999) (addressing proper legal standards for imputing managerial acts to an employer in the punitive damages context); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (addressing standards governing employer liability for hostile environment harassment perpetrated by supervisory employees).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

BARRY ACKERLEY, WILLIAM ACKERLEY, FULL HOUSE SPORTS & ENTERTAINMENT, INC., AND SEATTLE SUPERSONICS, INC., PETITIONERS,

v.

LAURA A. LAMBERT, ESTHER ACKLEY, STEVE BELLING, PAT COOKE, LETITIA SELK, AND CHUCK VILTZ, RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR THE PETITIONERS

Respondents do not dispute that the scope of Section 15(a)(3) is an important and recurring question of federal law. See Pet. 13-20; Chamber Am. Br. 2-7. Their sole ground of opposition on that issue is a strained contention that there is no circuit conflict, even though the conflict has been recognized by numerous courts and the EEOC. Respondents' argument relies on an artificial narrowing of the rulings of the Second Circuit and of the Ninth Circuit in this case and supplies no basis for denying review.

In a brief rife with distortions and phantom record cites, respondents baldly assert (Opp. 1) that it "cannot reasonably be disputed" that "the employees in this case filed a complaint and instituted proceedings under the Act." Disputed it was, however. The panel (Brunetti, Rymer and Kleinfeld, JJ.) not only found otherwise (see Pet. App. 44a-48a), but did so by "adopt[ing] the Second Circuit's analysis" in *Genesee Hospital* — the very decision that respondents now claim does not conflict with the en banc court's rejection of the panel decision.

Respondents' own actions belie their position here. Knowing full well that the common-sense meanings of "filed any complaint" and "instituted any proceeding" do not support a finding of protected conduct on their facts, respondents convinced the trial court to instruct not in terms of the statutory language itself, but in a manner carefully tailored to the outer contours of respondents' evidence:

> An employee has participated in protected activity if the employee has either complained ***to superiors*** regarding any issues related to the [FLSA] or ***requested information*** from the government about minimum wages or overtime compensation. [ER 360; emphasis added]

That is what the Ninth Circuit held subject to statutory protection and what the Second Circuit unambiguously said is ***not*** protected.

Respondents also mischaracterize the fundamental legal and procedural issues presented by the second and third questions as mere matters of evidentiary sufficiency. More broadly troubling, however, is their effort — exploiting the limitations on a reply in support of certiorari — to make the case appear "uncertworthy" by swamping the Court with factual assertions that are impossible to sustain on the basis of the record and that often do not even claim

record support. That cynical strategy should not be rewarded. There are no factual impediments to further review by this Court, which is warranted to settle the entrenched conflict on the scope of Section 15(a)(3), to reattach the FLSA to its legal moorings, and to confine the Ninth Circuit to its proper role in interpreting legislation.

1. a. Implicitly conceding that the issue of the scope of Section 15(a)(3) is important and recurring, respondents rely primarily on the contention that this case does not reflect a circuit conflict. See Opp. 9-17. But their argument distorts both the decision below and the Second Circuit's ruling in *Genesee Hospital* by relying upon factual differences that were plainly of no moment to the respective courts' formulations of conflicting rules.

Thus, respondents paint the Ninth Circuit's holding as narrowly dependent on Lambert's telephone calls to the Department of Labor and on her placing her overtime concerns in writing. Similarly, they portray *Genesee Hospital* as limited to situations involving only oral complaints. See Opp. 10-11. But these depictions contrast sharply with what the two courts said they were deciding. The Ninth Circuit announced that it would "resolve whether the anti-retaliation provision of [the FLSA] protects employees who complain to their employers about wage and hour violations," and it expressly "***h[e]ld*** that complaints made to employers are within the ambit of the FLSA's anti-retaliation clause." Pet. App. 2a (emphasis added). See also *id.* at 9a, 17a. The Second Circuit reached exactly the opposite conclusion, holding that "[t]he plain language of [the FLSA] * * * does not encompass complaints made to a supervisor." *Genesee Hospital*, 10 F.3d at 55.

Respondents assert (Opp. 10) that "[i]t remains to be seen whether the Ninth Circuit would hold an oral complaint that did not assert coverage under the statute to be protected activity." But there is nothing to wait for. The Ninth Circuit held in no uncertain terms that "the employee may communicate such allegations orally * * * and need not refer to the statute by name." Pet. App. 17a.[1] In any event, the issue that divides the courts, and

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[1] Respondents assert (Opp. 2) that "[n]either the Ninth Circuit nor any other federal court of appeals has held that employees like those in

that is dispositive here, is not the method of complaining but the recipient of the complaint — the government or the employer.

Respondents try to obscure the conflict by contending (Opp. 13) that Lambert "filed a complaint" with the Department of Labor by requesting information over the phone — a theory not encompassed in the jury instructions (see ER 360) and not considered by the Ninth Circuit. See also pp. 5-6, *infra*. Moreover, even if an informal oral communication to the government had been the basis for the judgment, respondents are flatly wrong in asserting (Opp. 13) that "every Circuit addressing the issue has held that informal complaints to and requests for information from the government constitute protected activities under § 215(a)(3)." ***None*** of the cited cases concerns mere "requests for information." *Romeo*, *White & Son*, and *Love* concern only informal complaints to the employer, for which the conflict is patent; *Casey Truck*, *Richardson*, and *Maxey's* involve participation in the process or obtaining the benefits of formal enforcement proceedings.

Respondents are alone in denying the conflict. The en banc court below described the Second Circuit rule to be that "the FLSA does not protect employees who complain internally to their employers" (Pet. App. 11a) but pointedly "join[ed] six ***other*** circuits" to "hold that complaints made to employers are within the ambit of the FLSA's anti-retaliation clause." *Id.* at 2a (emphasis added). The original panel in this case likewise "recognize[d] that several other circuits have come to the conclusion that informal complaints and requests for information from the DOL do constitute protected activities" but "reject[ed] this approach" (*id.* at 47a, 48a) and instead "adopt[ed] the Second Circuit's analysis" (Pet. App. 45a). See also *Knickerbocker* v. *City of Stockton*, 81 F.3d 907, 912 n.3 (9th Cir. 1996) (acknowledging conflict). And the Second Circuit adverted in *Genesee Hospital* to the "contrary" decisions of "a number of our sister circuits." 10 F.3d at 55.

Genesee Hospital, who merely complained that their wages were 'unfair,' are protected by § 215(a)(3)." In fact, the Ninth Circuit explicitly relied on a case resting liability on an employee's comment that she "believed the employer was 'breaking some sort of law.'" Pet. App. 17a (quoting *EEOC* v. *Romeo Community Schools*, 976 F.2d 985, 989 (6th Cir. 1992)).

Recognition of this ripe conflict is widespread. For example, the First Circuit recently noted that "courts of appeals grappling with this issue have differed." *Valerio* v. *Putnam Associates Inc.*, 173 F.3d 35, 41 (1st Cir. 1999). District courts too have stated that the "Courts of Appeals have split on the issue." *Ball* v. *Memphis Bar-B-Q Co.*, 34 F. Supp.2d 342, 345 (E.D. Va. 1999); see also *O'Neill* v. *Allendale Mutual Ins. Co.*, 956 F. Supp. 661, 664-665 (E.D. Va. 1997). Even the EEOC has acknowledged the conflict. See, *e.g.*, EEOC C.A. Br. 4 (arguing that "only the Second Circuit has read section 15(a)(3)" in a manner that would deprive respondents of a cause of action); see also U.S. EEOC, *Compliance Manual*, Section 8-II (B)(1), at 8-3 n.12 (1998).

In light of the conflict among the circuits and the undisputed importance of the issue, further review is warranted.

b. Respondents make the remarkable claim that the ruling in their favor involves nothing more than a "routine application of unambiguous statutory language." Opp. 1. They even go so far as to assert that any construction of Section 15(a)(3) adverse to them would constitute a "[j]udicial [r]epeal of the [s]tatute." Opp. 16. It is ironic indeed to see such assertions proffered by parties who convinced the trial court to define the protected conduct for the jury as "complain[ing] to ***superiors*** * * * or ***request[ing] information*** from the government" (ER 360; emphasis added) — words that are found nowhere in the statute. Indeed, even Judge Reinhardt's opinion for the en banc court found the language of Section 15(a)(3) "possibly subject to differing interpretations." Pet. App. 9a. And the First Circuit, though concluding that the purposes of the statute warranted enlargement of its terms, characterized the issue of statutory construction as "indeed a close question." *Valerio*, 173 F.3d at 41. Significantly, the courts that originated the construction of Section 15(a)(3) adopted by the Ninth Circuit did not even pretend that their interpretations were grounded in the terms of that law. For instance, the Third Circuit, in language echoed in part by the court below (Pet. App. 8a, quoting *Valerio*), stated that it and other "courts interpreting the anti-retaliation provision have looked to its animating spirit in applying it to activities that might not have been explicitly covered by the language." *Brock* v. *Richardson*, 812 F.2d 121, 124 (3d Cir. 1987). See also Pet. 12.

Respondents seek (Opp. 14-15) to bolster their interpretation by dissecting into unrecognizable pieces the "familiar legal expressions" (*Bradley* v. *United States*, 410 U.S. 605, 609 (1973)) that the statute uses. In so doing, they make not the least effort to explain how that approach could accord with this Court's precedents. See Pet. 15-16. Respondents cannot dispute that the familiar legal sense of "filing a complaint" is formally to place such a document with the clerk of a court or with an agency. Indeed, that usage is ***so*** familiar that respondents employ it themselves when they concede that their own draft "***complaint was not filed*** with the court." Opp. 4 (emphasis added).

Neither *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960), nor *Drollinger* v. *Arizona*, 962 F.2d 956 (9th Cir. 1992), supports the decision below. *Mitchell* had nothing to do with complaints to employers; rather, it hinged on the proposition that Section 215(a)(3) is intended to make "employees ***fe[el] free to approach officials*** with their grievances." 361 U.S. at 290 (emphasis added). And *Drollinger* affirmatively refutes their position. The case was decided not under Section 15(a)(3), but under the long-lapsed 1985 amendments that ***broadened*** FLSA anti-retaliation protections ***temporarily*** for certain public employees. See Pet. 19-20. Thus, while the decision below is consistent with the language of the expired temporary provision, that fact simply confirms its departure from the quite different terms of Section 15(a)(3).[2]

c. In their most imaginative gambit, respondents — who elsewhere claim (see Opp. 16) that employees cannot possibly initiate an enforcement proceeding at the Department of Labor —

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[2] Respondents erroneously assert that "Washington law provides that a lawsuit in Superior Court is commenced by serving the complaint on the defendant." Opp. 15. In fact, Washington procedure requires service of a summons "together with" the complaint (Wash. R. Super. Ct. Civ. R. 3), which did not happen here. Moreover, the Washington Rules confirm that serving and filing of a complaint are distinct concepts: "a civil action is commenced by service of a copy of a summons together with a copy of a complaint, as provided by rule 4, ***or by filing a complaint.***" *Ibid.* (emphasis added). In any event, the issue here is not the effect of respondents' actions under Washington law but whether they "filed any complaint" within the meaning of Section 215(a)(3).

say that Lambert's two phone calls requesting information from the Department "initiat[ed] enforcement actions by the Department of Labor" (Opp. 15). This absurd contention was neither made by respondents below nor relied on by the Ninth Circuit, which described the issue before it as "whether the anti-retaliation provision of [the FLSA] protects employees who complain to their employers about wage and hour violations." Pet. App. 2a.

Indeed, the jury was never asked to find whether Lambert had "instituted any proceeding * * * under or related to" the FLSA, but only whether she "requested information from the government" (ER 360). That respondents knew that their evidence established nothing more is apparent from review of the testimony on which respondents' newly minted theory relies. See App., *infra*, 1a-3a. All the Labor Department official did was to "walk[] through the overtime compensat[i]on structure" over the telephone, "point[ing] out those things which were against the law" (*id.* at 1a), and then mail "documentation" on which "he had marked everything that was pertinent." *Id.* at 2a-3a. That is the sum of the evidence that respondents advance for their claim that they "instituted any proceeding * * * under or related to" the FLSA.

2. Respondents try to obscure the Ninth Circuit's remarkable legal judgment that corporate officers are personally liable for their subordinates' retaliatory acts, but they cannot make the issue go away. The jury in this case was charged that any "corporate officer or director with significant control of * * * a corporation" that employed respondents was "liable if you find in favor of the plaintiffs on their FLSA claims." ER 361-362. Although this instruction required no proof of a personal violation of the FLSA by either individual defendant, the Ninth Circuit adopted this unjust and untenable standard as "entirely consistent with our interpretation of 'employer' under the FLSA, and * * * in no way erroneous." Pet. App. 25a.

Respondents unwittingly acknowledge the need for further review when they state that "[t]he FLSA grants an employee a private right of action against a person ***who has engaged in retaliation*** if that person is an 'employer.'" Opp. 18 (emphasis added). That is precisely the point. The fatal flaw in the instruction given in this case is that it does ***not*** require the jury to find that the employer himself "engaged in retaliation." Rather, it

directs a verdict against any manager with ultimate "control" so long as ***any*** employee has violated the FLSA.

Respondents erroneously assert (Opp. 19) that the courts are not in conflict over the standards for individual liability under the FLSA. In fact, as the Chamber of Commerce has laid out (Br. 13-15), the courts have employed various, disparate standards. See also Pet. 21 n.7. Respondents also observe (Opp. 18) that no manager has been relieved of liability as a matter of law on similar facts, but that is not surprising: no other plaintiff appears to have sought individual liability under such circumstances. Respondents fail to identify a single case in which senior executives of a solvent, publicly traded company have been subjected to compensatory liability under the FLSA, let alone to millions in punitive damages.[3] Nor has personal liability ever rested solely on a finding that the individuals had the authority to control their subordinates, without regard to personal involvement in wrongdoing.

b. Rather than defend the legal standard for personal liability used at trial and upheld on appeal, respondents mischaracterize the question presented as involving a challenge to the sufficiency of the evidence of the Ackerleys' status as "employers." They then try to improve upon the flimsy evidence cited by the Ninth Circuit as sufficient to support individual (and punitive) liability (see Pet. 22-24 & nn. 8-9) by asserting numerous purported facts (Opp. 20-22) to show that Barry Ackerley and William Ackerley could be found personally complicit in the alleged retaliation against respondents. (Even if valid, that showing is irrelevant here, because the jury was never required to determine whether the individual defendants personally committed, authorized, or even knew of the alleged violation.)

Regrettably, many of respondents' assertions are fabricated from whole cloth or liberally embroidered; those that have some foundation in the record say nothing about ***retaliation***, but rather show only that the Sonics' top managers reported to Barry

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[3] Respondents' claim (Br. 20) that "the Ackerleys' corporation" was "closely held" is flatly wrong. As respondents know full well, having themselves put the company's Form 10-K into evidence, the corporation's stock has been publicly traded for years. See Pet. App. 74a n.16.

Ackerley and William Ackerley, and that the former was aware of Lambert's overtime dispute while the latter knew of the planned discharge of the ticket sales employees (but not, so far as the evidence shows, of any improper motive for the action).

Because of space limitations, a few examples typifying respondents' misleading assertions will have to suffice. Respondents state (Opp. 21) that Eric Rubin, general counsel for Ackerley Communications, "was intimately involved in the unlawful plan." The cited testimony (and the rest of the record) contains nothing about a plan, but says only: "I called our corporate counsel * * * [a]nd I perhaps assumed that our corporate counsel was going to tell Barry if he felt the need to." App., *infra*, 4a. Likewise, there was no evidence that Dresel's June 22, 1994 note that "Barry [was] being told" had ***anything*** to do with a so-called "retaliation strategy" (Opp. 21). See App., *infra*, 8a. Rather, that notation referred to the June 17 letter from Lambert's attorneys. See *id.* at 4a; ER 117-118. Respondents seem to believe — and the Ninth Circuit apparently accepted — that any evidence that either Barry Ackerley or William Ackerley was told about any overtime issue proves their personal involvement in ***retaliation*** against respondents. That is preposterous.

Respondents also assert (Opp. 21) that a "memorandum from Mr. Dresel inform[ed William] Ackerley of the retaliatory firings." Again, the word "retaliatory" is pure invention. The memorandum (App., *infra*, 7a) noted that "the ticketing staff's hours" had been reduced the previous November for lack of work, that in the current winter Dresel expected "insufficient work to keep these employees busy," and that he had concluded "that these positions are more seasonal in nature." Dresel announced that he was "therefore planning to layoff the entire ticketing sales staff by November 30." *Ibid.* Of retaliation or overtime there is not a word. Yet respondents insist that this is evidence that William Ackerley violated the FLSA.

Finally, the supposed "evidence" that "Barry Ackerley was personally involved in employee terminations and actively participated in other issues relating to ticket sales" (Opp. 22) had nothing to do with the fate of the ticket sales clerks. Rather, the evidence showed only that Dresel "talked to" Barry Ackerley about basketball "ticket ***prices***" and discussed the situation of a

radio personality who had, in order to gain release from a contract, been "verbally abusing" members of the Sonics organization over the airwaves. App., *infra*, 5a-6a.[4]

3. Respondents do not attempt to deny that the Ninth Circuit made itself the fact-finder on an essential element of liability by finding that each respondent engaged in protected conduct because Lambert "complained" in a representative capacity. Whether that was so was disputed at trial but never presented to the jury, which was not required to find that more than one plaintiff had complained in any way. See Pet. 25-26. Instead, respondents rely on a misapplication of concepts of harmless error.

While a failure to instruct a jury on an element of liability may be harmless if the jury's decisions "necessarily included" the requisite finding covered by the omitted instruction, see *United States* v. *Sun-Diamond Growers*, 119 S. Ct. 1402, 1411 (1999) (rejecting such a claim), or if the material facts as to the omitted element were wholly uncontested, as in *Neder* v. *United States*, 119 S. Ct. 1827, 1837 (1999), a fundamentally flawed instruction on a ***disputed*** element (see Pet. 26 n.12) cannot qualify as "harmless error." In such circumstances, the reviewing court may not "perform the jury's function of evaluating the evidence of [a material element], when the jury never may have performed that function." *Connecticut* v. *Johnson*, 460 U.S. 73, 86 (1983). "Such an error" deprives parties "of 'constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.'" *Ibid.* (quoting *Chapman* v. *California*, 386 U.S. 18, 23 (1967)). The Ninth Circuit's "view [of] the evidence" — much

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[4] Likewise, accepting that John Dresel's altered (but restored) Daytimer calendar placing Barry Ackerley's name above Laura Lambert's (see App., *infra*, 9a) on the first business day after receipt of the letter from Lambert's lawyers could show Barry Ackerley's knowledge of Lambert's grievance, it certainly did nothing to "link[]" Barry Ackerley to any "Laura Lambert strategy." Opp. 21. And the fact that the name "Barry" appeared "between 25 and 30 times" in Dresel's 1994 Daytimer (RT 781) — before, during, and after Lambert's complaint — shows little more than Barry Ackerley's general involvement in the operations of the subsidiary that employed Dresel — far too flimsy a basis for implication in any retaliation.

less respondents' self-serving assessment (see Opp. 24 n.4) — "is * * * simply irrelevant." *Ibid.*

In addition, and characteristically, respondents cite ***no*** evidence to support their assertion that "each of the respondents communicated with the petitioners about overtime." Opp. 24 n.4. (The evidence contradicting this assertion is collected at Pet. 26 n.12.) Certainly no other respondent chose to join Lambert's contemplated lawsuit, so that her ***written*** complaints — on which respondents rely so heavily in trying to evade review of the first question (see Opp. 10-12) — explicitly were made on her behalf alone. See Pet. 26 n.12. Indeed, the evidence on this issue was so one-sided in favor of ***petitioners*** that, rather than attempt to prove that any of the five respondents other than Laura Lambert complained in ***any*** way, respondents fought for and obtained an instruction that required the jury to find only that ***Laura Lambert's complaint*** caused the others' discharge. Thus, the jury was explicitly told, at respondents' behest, that it did ***not*** have to find "that each plaintiff engaged in protected activity" so long as "one plaintiff engaged in protected activity." ER 360. See Pet. 25-26.

Even if their evidence on the point were far stronger, respondents cannot have it both ways. Having kept the representation issue from the jury, they cannot rest on the availability of evidence to support a finding they resisted having to establish and never obtained. The Ninth Circuit's eagerness to play fact-finder "so far depart[s] from the accepted and usual course of judicial proceedings" (Sup. Ct. R. 10(a)) that it warrants correction by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 1999

APPENDIX

APPENDIX

[from SER 187; RT 68]

Q What happened next?

A The next thing I did, two days following that meeting with Eddie, is I decided if it was a principle issue for me I needed to make sure that what I was talking about was correct. And I looked in the phone book, and I didn't really know what I was looking for, but anybody that could help me about overtime compensation and how it was supposed to be paid. And I had called the U.S. Department of Labor.

Q When was that?

A That was on the 18th. And I had left a message. And they said that the gentleman who would be calling me back wouldn't be able to call me until the next day, which was the 19th.

Q The 19th of May?

A Of May, yes. And his name was Officer Williams and he would be contacting me sometime in the morning.

Q And did you speak with Officer Williams on the 19th?

A Yes.

Q After talking with Officer Williams, did you come to any conclusions about the Sonics overtime payment scheme?

A Yes, I did.

[SER 188; RT 69]

Q And what was that conclusion?

A He had walked through the overtime compensaton structure, and I briefly explained to him what our current structure was. And he had pointed out those things which were against the law and in violation.

And following that I went back to Eddie Roldan. I was kind of excited, thinking, you know, now they'll do the right thing and maybe they just didn't know that they were doing it wrong. So I went back to Eddie and explained it to him.

* * *

[omitted material recounts conversations with Sonics employees Roldan and Boustead]

[from SER 190; RT 71]

Q What was the next thing you did after Mr. Boustead told you this?

A I went back to my desk and I called the U.S. Department of Labor again and asked to speak with Officer Williams.

Q And what did you ask him?

A I had asked — I told him that they had said that they would get the checks cut, they had a meeting, that it was a dead issue and nothing was going to be resolved. And I asked him if he could send me the documentation in the mail showing that that's how they were supposed to pay it.

Q Why did you ask him to send you documentation in the mail?

A Because nothing else seemed to work so far.

Q Did you plan to show that to Sonics management?

[SER 191; RT 72]

A I had planned to actually first make sure again that what I was saying was correct, because I didn't want to make waves. I loved my job. I didn't want to cause any trouble. And that's what I did. I asked for the documentation so I could read over it.

Q May 19th, anything else happen that day?

A No, not that day.

Q May 20th, you had the documentation in hand.

A He had mailed the documentation the day before, said I should have it the following day, and he had mailed it to the Sonics office. I got that in the morning and I read over it.

Q Then what did you do?

A Actually I was surprised when I opened it, because he had marked everything that was pertinent to our office and our structure as salespeople, which helped me out a lot because I wouldn't have known where to begin.

So I read the items that he had marked and I read the items that he had highlighted. And then after I was 100 percent sure that what I saying was correct I went back again to the accounting department and talked to Eddie.

[from SER 311; RT 780]

Q Now, let me — I put this a little too far toward the top. The heading on your notes is personnel issues, correct?

A That's correct.

Q And one of the things you indicate in your notes is Barry Ackerley was being told about the overtime problems; isn't that true?

A What that refers to, again, I called our corporate counsel on the Tuesday and said to him, we have an issue here with a person who works for us about overtime, what do I do? And he said he'd take care of it. And I perhaps assumed that our corporate counsel was going to tell Barry if he felt the need to. I to this day have no idea what he told Barry.

Q Your corporate counsel is a gentleman named Erick Rubin, correct?

A That's correct.

Q And he is based in New York City?

A No, he's not. He's based in Washington, D.C.

Q Where is he?

[SER 312; RT 781]

A. Washington, D.C.

Q Washington, D.C. In any event, he is here in this courtroom, is he not, sitting right back here?

A He is indeed.

Q And so you are saying that you talked to Mr. Rubin and told him that there is an employee raising an overtime claim; is that correct?

A That's correct.

Q And so instead of writing Eric being told or general counsel being told, you decided to write Barry being told in your notes?

A Yeah. Again, I've never talked to Barry about this. I told Mr. Rubin, there's a claim. He said, he'd take care of it, and whether he has or not taken care of it or whether he told Barry or not, I don't know.

Q Would you disagree with me, Mr. Dresel, if I told you that the name Barry Ackerley or Barry appears in your Daytimer for 1994 somewhere between 25 and 30 times?

A I'd have to count it up in order to disagree with you, but it — it appears in there quite a few times, that's right.

Q It does?

A Um-hum.

Q And you talked to Mr. Ackerley about ticket prices, didn't you?

A At times, yeah.

[SER 313; RT 782]

Q You talked to Mr. Ackerley about the Fabulous Sports Babe, didn't you?

A Only because she was verbally abusing us on the air, yes.

Q But at no time has this problem been the kind of problem you felt like you should talk to Mr. Ackerley about?

A This is not the type of problem that I would discuss with the chairman of our company, no. Now, the Sports Babe is this woman who has been on our radio station for a long time, and at one point she got an offer from ESPN Radio to go to work for them, and she really wanted to go, and unfortunately she was under contract with us.

So in order for her to get out of her contract, she began saying very awful things about myself and Ackerley Communications, and I felt the need to tell the chairman that what he was listening to was in reference to her trying to get out of her contract.

It was a very fun time in our lives.

[ER 113; Plaintiff Exhibit No. 2]

MEMORANDUM

October 12, 1994

TO: Bill Ackerley

FROM: John Dresel

RE: Layoffs

cc: Debbie Stednick

Last November the ticketing staff's hours were reduced because ticket inventory for the remaining games was so small, we were convinced the games would sell out via tickets sold through TicketMaster. As with last year, we believe this will happen and again this year resulting in insufficient work to keep these employees busy. Considering this I have reached the conclusion that these positions are more seasonal in nature. I am therefore planning to layoff the entire ticketing sales staff by November 30. Any residual requirements for sales will be the responsibility of the manager of this department. The current staff will be compensated for any individual and group sales made during their tenure.

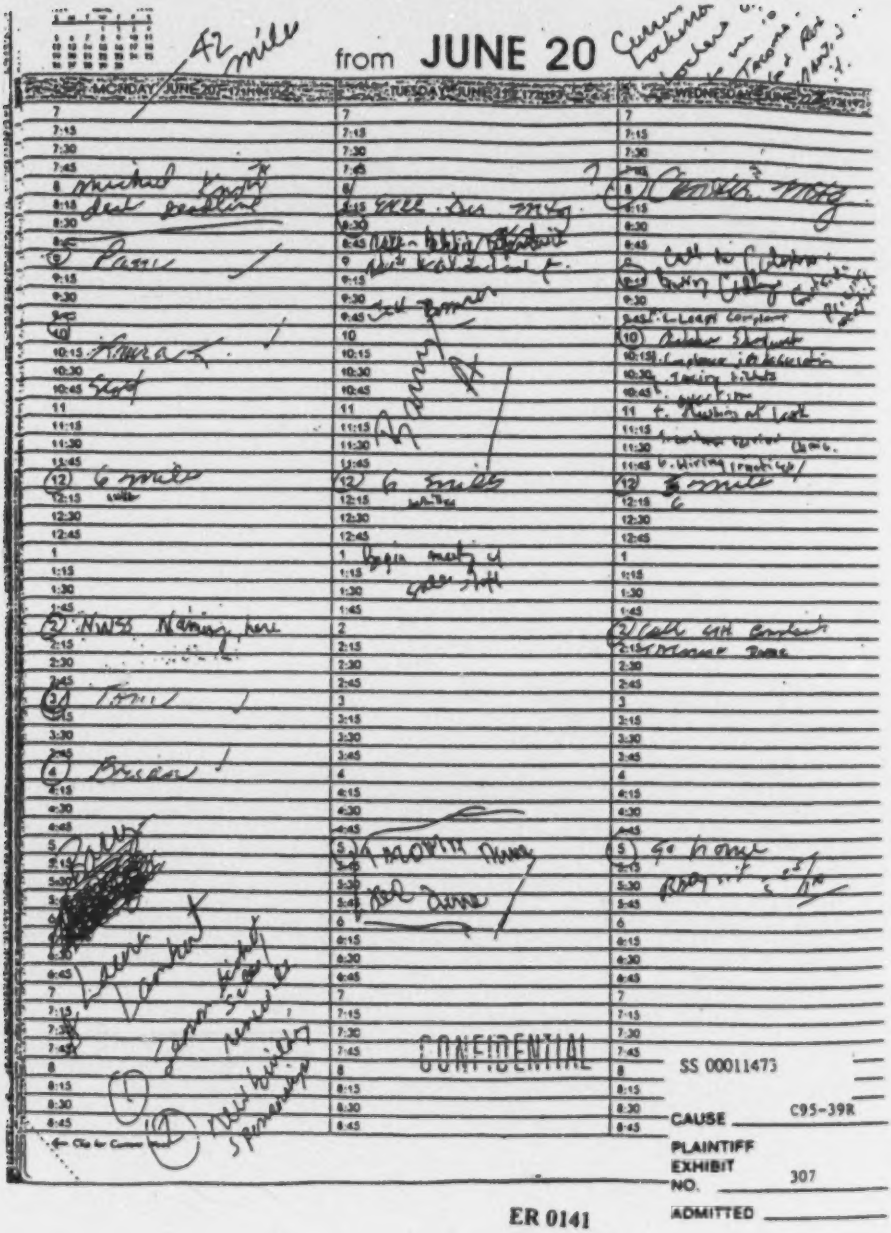
[ER 121; Plaintiff Exhibit No. 55 (original is handwritten)]

Personnel Issues

1. Job descriptions — going out
2. Reviews — o.k. & ready
3. tickets to employees
4. overtime — over
   - are Salary & Bonus employees exempt?
   - Barry being told
5. Interview seminar
6. Customer Service Seminar

   Laura Kussick show Debbie Stednick Customer Service info

[ER 141; Plaintiff Exhibit No. 307 (reduced)]



ER 0141

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